TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted] 91

[redacted] CHATTAHOOCHEE LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

R. W. GLENN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED MARCH 18, 1892.

(24,058)

(24,098)

SUPREME COURT OF THE UNITED STATES.

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vs.

R. W. GLENN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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1 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, November Term, 1913, Fourth Circuit, Dillon County.

Hon. Thomas S. Sease, Circuit Judge.

R. W. GLENN, Plaintiff-Respondent,
against
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Case with Exceptions.

Joe P. Lane, L. B. Haselden, Attorneys for Plaintiff-Respondent.
Henry Buck, F. L. Willcox, Attorneys for Defendant-Appellant.

Statement.

This case was commenced by service of the summons and complaint on June 28th, 1912. The action was to recover dam-
2 ages for delay to a shipment of cattle from Chester, South Carolina, to Latta, South Carolina, on November 21st, 1911. The shipment was delivered to the Southern Railway Company, and by it delivered to defendant at Columbia, South Carolina. It moved under what is known as a "Limited Live Stock Liability Contract," which, among other things, provided: "That the responsibility, either as common carrier or warehouseman of each carrier over whose line the property shipped hereunder shall be transported, shall cease as soon as delivery is made to the next carrier or to the consignee; and the liability of the said lines contracted with is several and not joint; neither of the said carriers shall be responsible or liable for any act, omission or negligence of the other carriers over whose lines said property is or is to be transported." The consideration of said contract of shipment was reduced freight rate, as stated therein.

The complaint was as follows:

The complaint of the plaintiff above named respectfully shows to this Court:

I. That the defendant is now, and was at the times hereinafter mentioned, a corporation duly chartered and organized under the laws of the State of Virginia, and, as such, with its connecting lines of railway, is doing business in the State of South Carolina as a common carrier of freight and passengers for hire.

II. That on or about the 21st day of November the plaintiff delivered, or caused to be delivered to the defendant, through its agent and connecting line, the Southern Railway Company at Chester, in the State of South Carolina, and the defendant received one carload of cattle, consisting of thirty-eight head of beef cattle and five milch cows and five calves, the property of the plaintiff, which the defend-

ant, as a common carrier, as aforesaid, promised and agreed,
3 in consideration of a reasonable compensation paid or to be paid it, safely and promptly to carry to Latta, in the county of Dillon and State of South Carolina, and there to deliver the same to the plaintiff.

III. That the defendant did not safely and promptly carry and deliver the said cattle pursuant to said agreement, but, on the contrary, regardless of its duty to the plaintiff as a common carrier, negligently and carelessly kept said cattle on the road for a much longer period than was necessary.

IV. Plaintiff further alleges, on information and belief, that the defendant, regardless of its duty as a common carrier, as aforesaid, negligently and carelessly handled the said cattle while upon its road and under its care, and negligently and carelessly kept said cattle confined in the car without unloading same for rest and without watering and feeding the same from on or about the 21st to the 24th day of November, 1911.

V. That, as a direct result of the carelessness and negligence, as aforesaid, all of said cattle were made sick and weak, and that two of the said beef cattle died within ten days after the defendant delivered them; that the said milch cows went dry immediately thereafter, and that all of said cattle were greatly damaged from the causes aforesaid.

VI. That the following is a list of the cattle which died and the prices actually paid for same at Chester, S. C., and defendant alleges that the same were worth much more at Latta, S. C., at that time:

One steer, cost	$21.00
One steer, cost	28.00

VII. That plaintiff also paid to the defendant on the delivery of said cattle an alleged feed bill of the sum of sixteen dollars, which plaintiff alleges, as aforesaid, was not justly due.

4 VIII. Plaintiff further alleges that the forty-six cattle which did not die were damaged by the aforesaid carelessness and negligence of the defendant in the sum of two hundred and fifty dollars.

IX. That this plaintiff has been damaged by the defendant in the sum of three hundred and fifteen and 00-100 ($315) dollars, no part of which has been paid.

For a Second Cause of Action.

I. That the defendant is now, and was at the times hereinafter mentioned, a corporation duly chartered and organized under the laws of the State of Virginia, and, as such, with its connecting lines of railway, is doing business in the State of South Carolina as a common carrier of freight and passengers for hire.

II. That on or about the 21st day of November, 1911, the plaintiff delivered, or caused to be delivered to the defendant, through its agent and connecting line, the Southern Railway Company, at Chester, in the State of South Carolina, and the defendant received

one carload of cattle, consisting of thirty-eight head of beef cattle and five milch cows and five calves, the property of the plaintiff, which the defendant as a common carrier, as aforesaid, promised and agreed, in consideration of a reasonable compensation paid or to be paid it, safely and promptly to carry to Latta, in the county of Dillon and State of South Carolina, and there deliver the same to the plaintiff.

III. That the defendant did not safely and promptly carry and deliver the said cattle pursuant to said agreement, but, on the contrary, regardless of its duty to the plaintiff as a common carrier, negligently and carelessly kept said cattle on the road for a much longer period than was necessary.

IV. Plaintiff further alleges, on information and belief, that the defendant, regardless of its duty as a common carrier, as
5 aforesaid, negligently and carelessly handled said cattle while upon its road and under its care, and negligently and carelessly kept said cattle confined in the car without unloading the same for rest and without watering and feeding the same from on or about the 21st to the 24th day of November, 1911.

V. That as a direct result of the carelessness and negligence, as aforesaid, all of said cattle were made sick and weak, and that two of the said beef cattle died within ten days after the defendant delivered them; that the said milch cows went dry immediately thereafter, and that all of said cattle were greatly damaged from the causes aforesaid.

VI. That the following is a list of the cattle which died, and the prices actually paid for same at Chester, S. C., and defendant alleges that the same were worth much more at Latta, S. C., at that time:

One steer, cost	$21.00
One steer, cost	28.00

VII. That plaintiff also paid to the defendant on the delivery of the said cattle an alleged feed bill of the sum of sixteen dollars, which plaintiff alleges, as aforesaid, was not justly due.

VIII. Plaintiff further alleges that the forty-six cattle which did not die were damaged by the aforesaid carelessness and negligence of the defendant in the sum of two hundred and fifty dollars.

IX. Plaintiff alleges further that said contract for shipment was over the lines of two or more common carriers, the defendant being one of them and terminal carrier; that said contract provided in effect that the responsibility of each of said carriers should cease upon delivery to its connecting line of said cattle in good order; that the defendant received said cattle under the terms of said contract.

6 X. That on or about the 24th day of November, 1911, the plaintiff filed with the defendant's agent at Latta, S. C., a claim made out in due form covering said damage to the extent of the sum of one hundred and forty-one dollars, and although more than thirty days elapsed after said notice and claim for damages had been given to defendant before the commencement of this action, yet the defendant has never adjusted nor paid the same, nor any

part thereof, nor has the defendant traced said shipment and informed plaintiff when, where and by which carrier the said cattle were damaged, by reason of which plaintiff alleges defendant is responsible for said damage, with interest on same from the date of the filing of the said claim, together with the sum of fifty dollars by way of penalty, according to the statute in such case made and provided.

Wherefore, plaintiff demands judgment against the defendant for the sum of three hundred and fifteen and 00-100 dollars, with interest on the same from the date of the filing of the said claim, together with fifty and 00-100 dollars as penalty and the costs of this action.

JOE P. LANE,
Plaintiff's Attorney.

STATE OF SOUTH CAROLINA,
County of Dillon:

Personally appeared before me R. W. Glenn, who, being duly sworn, says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and the same is true, to his own knowledge, except as to those matters therein stated on information and belief, and as to such matters he believes it to be true.

(Signed) R. W. GLENN.

Subscribed and sworn to before me this the 19th day of June, A. D. 1912.

(Signed) W. H. SMITH,
[OFFICIAL SEAL.] *Notary Public.*

7 The answer was as follows:

The defendant, answering the complaint herein, says:

For a First Defense to Plaintiff's First Cause of Action.

First. That it admits paragraph one of the complaint.

Second. That it admits that on or about the 21st day of November, A. D. 1911, the plaintiff caused to be delivered to the Southern Railway Company certain cattle.

Third. That it denies paragraph three, four, five, seven, eight and nine of said first cause of action, and denies each and every other allegation of said first cause of action not herein specifically admitted or explained, and denies that it is due the plaintiff any sum whatsoever.

Fourth. That it has not knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph six of said cause of action.

For a Second Defense to Plaintiff's First Cause of Action.

First. That on or about the 21st day of November, 1911, the plaintiff caused to be delivered to the Southern Railway Company at Ches-

ter, South Carolina, the cattle described in the complaint; and that, in consideration of a reduced freight rate, granted to plaintiff by said Southern Railway Company, plaintiff agreed and contracted with said Southern Railway Company, which contract by its terms enures to the benefit of defendant, that he would indemnify and save harmless the said Southern Railway Company and this defendant against any and all claims of any person against said Southern Railway Company and this defendant arising out of loss or damage to said live stock while being transported, except such liability as should accrue by reason of the negligence of said Southern Railway Company and this defendant, their servants and employees; that is to say, among other things, he would so indemnify the Southern Railway Company and this defendant against claims arising out of
8 loss or injury to said live stock accruing from the inherent vice, or the wild and unruly condition or conduct of any of said live stock, including self-inflicted injuries; or, from the inherent defect, weakness or vitality of said live stock.

Second. That if any of the cattle contained in the shipment described in the complaint were damaged or injured in any manner whatsoever, that it was not done by any negligence on behalf of the defendant, or any of its agents or employees, and this defendant, by reason of the foregoing contract, fairly entered into with plaintiff, at the time of shipment, for valuable consideration, is relieved of all liability on account of any loss of or damage to said live stock.

For a Third Defense to Plaintiff's First Cause of Action.

First. That on or about the 21st day of November, 1911, the plaintiff caused to be delivered to the Southern Railway Company at Chester, South Carolina, the certain live stock described in the complaint, and that at said time, in consideration of a reduced freight rate granted the plaintiff, plaintiff agreed and contracted with said Southern Railway Company, which contract by its terms enures to the benefit of defendant, that, should damage occur for which said Southern Railway Company and this defendant might be liable, the value at the place and date of shipment should govern the settlement, but in no event should the amount claimed or recovered exceed for each cow and calf, together, $35; for grown cattle, each, $30; for yearling cattle, each, $15, and for calves, each, $5; and this defendant alleges that by reason of the foregoing contract, fairly entered into for valuable consideration, plaintiff is estopped from claiming or recovering any sum greater than that hereinbefore mentioned for each of said classes.

9 *For a Fourth Defense to Plaintiff's First Cause of Action.*

First. That on or about the 21st day of November, 1911, the plaintiff caused to be delivered to the Southern Railway Company at Chester, South Carolina, the certain live stock described in the complaint, and that at said time, in consideration of a reduced freight rate granted to plaintiff, the plaintiff agreed and contracted

with said Southern Railway Company, which contract by its terms enures to the benefit of defendant, that, as a condition precedent to his right to recover any damage for loss of, or injury to, said live stock, plaintiff would give notice in writing of his claim therefor to the agent of the carrier actually delivering said live stock before said live stock was removed from the place of delivery and before said live stock was intermingled with other live stock.

Second. That this defendant, on information and belief, alleges that plaintiff did not comply with the foregoing provisions of said contract and is now estopped from setting up any claim for loss of, or injury to, any of said live stock; and that by reason of his failure to comply with said provisions of said contract as above set forth, which was fairly entered into, for valuable consideration, this defendant is relieved from any and all liability on account of any such loss or damage as is alleged in the complaint.

For a Fifth Defense to Plaintiff's First Cause of Action.

First. That on or about the 21st day of November, 1911, the plaintiff caused to be delivered to the Southern Railway Company at Chester, South Carolina, the certain live stock described in the complaint, and that at said time, in consideration of a reduced freight rate granted plaintiff, the plaintiff agreed and contracted with said Southern Railway Company, which contract by its terms enures to the benefit of the defendant, that neither of the carriers over whose line said live stock should be transported should be responsible or liable for any action, omission or negligence of any other carrier over whose line said live stock might be transported.

Second. That this defendant denies that it was negligent in any manner whatsoever, and alleges that upon the delivery of said live stock to defendant, that this defendant safely and quickly transported same to its destination; that if there was any delay in the transportation of said live stock, or any damage done thereto, it was not over the lines of defendant; and that, by reason of said contract, fairly entered into, for valuable consideration, this defendant is relieved of any and all liability on account of any damage that may have been sustained by plaintiff from any cause whatsoever.

For Defense to Plaintiff's Second Cause of Action.

First. That it admits paragraphs one and nine of said second cause of action.

Second. That it admits so much of paragraph two as alleges that on the date therein named plaintiff caused to be delivered to Southern Railway Company at Chester, in the State of South Carolina, the certain cattle therein mentioned.

Third. That it denies paragraphs three, four, five, seven, eight and ten of second cause of action, and denies each and every other allegation of said cause of action not herein specifically admitted or explained; and denies that it was negligent in any manner whatsoever,

and denies that it is liable to plaintiff in any sum whatsoever by way of penalty as is alleged in said cause of action.

Fourth. That it has not knowledge or information to form a belief as to the truth of the allegations of paragraph six of said cause of action.

HENRY BUCK,
Defendant's Attorney.

11 STATE OF NORTH CAROLINA,
County of New Hanover:

Personally appeared A. H. Shepard, who, being duly sworn, says that he is freight claim agent of the Atlantic Coast Line Railroad Company, the defendant herein; that the foregoing answer is true of his own knowledge, except as to matters and things therein alleged on information and belief, and that as to those matters and things he believes it to be true; that this verification is made by deponent because defendant is a corporation, and that deponent's information and knowledge comes to him from an investigation made by the officers and agents of defendant.

A. H. SHEPARD.

Sworn to and subscribed before me this 21st day of August, A. D. 1912.

[L. S.] M. B. RAHM,
Notary Public.

My commission expires July 21, 1913.

After service of the answer, plaintiff's attorney moved before his Honor, George W. Gage, presiding Judge, for an order striking out the fifth defense of defendant's answer to plaintiff's first cause of action.

His Honor, Judge Gage, granted the following order:

On motion of Joe P. Lane, attorney for the plaintiff in the above entitled action, for an order striking out "all of the fifth defense, to the first cause of action, in the answer of the defendant; and after hearing Henry Buck, Esq., attorney for the defendant, in opposition thereto; and the constitutionality of Section 2574 of Volume I of the Civil Code of Laws of South Carolina for 1912, on which the motion is based, having been questioned by defendant's counsel, but it appearing to the Court that the statute should stand unless
12 unconstitutional beyond a reasonable doubt, and having such doubt, I hold the statute to be good; and by its terms the statute makes each road the agent for the other, notwithstanding any stipulation to the contrary;

And it is hereby ordered that "all of the fifth defense to the first cause of action," in the answer of the defendant, be stricken out as irrelevant.

(Signed) GEORGE W. GAGE,
Presiding Judge in the Fourth Judicial Circuit.

At chambers at Dillon, S. C., February 18th, 1913.

In due time, defendant served notice of intention to appeal from the foregoing order of Judge Gage. In due time the appeal was perfected and the case was docketed for the April term of the Supreme Court, and the case and exceptions filed with the Clerk. The foregoing, with the following exceptions, constituted said return:

Exceptions.

I. Because his Honor erred, it is respectfully submitted, in refusing to hold that Section 2574 does not apply to the contract of shipment in this case, which was based upon a valuable consideration, to wit, a reduction in freight rate.

II. Because his Honor erred, it is respectfully submitted, in granting plaintiff's motion and in refusing to hold Section 2574 unconstitutional and void, in that said section, as applied to this action, is in contravention of Article I, Section 5 of the Constitution of South Carolina and the Fourteenth Amendment to the Constitution of the United States, in that said section deprives defendant of the right of contract and deprives it of property without due process of law, making it responsible for the debts and liabilities of another without giving it adequate redress against such other.

III. Because his Honor erred, it is respectfully submitted, in refusing to hold that Section 2574, construed with Section
13 2575, is in contravention of said sections of the Constitution of South Carolina and the Constitution of the United States, in that said section, while purporting to make the carrier really at fault responsible to defendant, yet they together deprive defendant of its property without due process of law, in that no provision is therein contained whereby defendant can obtain compensation for its loss of time in defending suit against it, or the expense of defending such suit, and its attorney's fees.

Later defendant-appellant decided to abandon its appeal, and served attorneys for plaintiff-respondent with the following notice on May 5, 1913:

Take notice, that defendant-appellant in this case intends and does hereby abandon its appeal to the Supreme Court herein; expressly reserving, however, its right to raise by appeal all questions upon the determination of the action in the Court of Common Pleas.

F. L. WILCOX,
HENRY BUCK,
Attorneys for Defendant-Appellant.

To Joe P. Lane, Esq., L. B. Haselden, Esq., attorneys for plaintiff-respondent.

Thereafter plaintiff's attorneys served defendant's attorneys with the following notice:

You will please take notice that the undersigned, at 10 o'clock in the forenoon, on the 8th day of May, 1913, or as soon thereafter as counsel can be heard, before the Supreme Court, in Columbia, S. C., will demand that the above entitled case, be called, heard and determined in its regular order.

That in case said demand is refused by the Court the undersigned will move the Court for an order making the abandonment of the said appeal by the appellant, absolutely conclusive on all points raised in said appeal, and allowing to the appellant no right
14 to raise any of said questions upon the determination of the action in the Court of Common Pleas, and allowing to the respondent all costs of said appeal against the appellant, and for such other and further order as to the Court may, under the circumstances, seem just.

That in case said order be not allowed the undersigned will move the Court for an order dismissing the said appeal under Rule 1 of the Supreme Court.

JOE P. LANE,
L. B. HASELDEN,
Attorneys for Plaintiff-Respondent.

To Henry Buck, Esq., F. L. Willcox, attorneys for defendant-appellant.

Upon hearing the foregoing motion the Supreme Court passed the following order:

On motion of Henry Buck, Esq., it is ordered that the case be, and the same is hereby, abandoned with all costs of the appeal to the plaintiff-respondent, this 9th day of May, 1913.

The case came on for trial before his Honor, Thomas S. Sease, and a jury, at the Spring term of Court for Dillon county, and resulted in a verdict in favor of plaintiff for three hundred dollars.

Within due time, defendant served the following notice of intention to appeal:

Please take notice that defendant herein intends to appeal to the Supreme Court from the order of his Honor, Judge Geo. W. Gage, striking out defendant's fifth defense herein, heretofore granted; from the rulings and charge of his Honor, Judge Thomas S. Sease, and from the judgment entered or to be entered herein, upon a case and exceptions hereafter to be served.

July 16, 1913.

HENRY BUCK,
Defendant's Attorney.

To Joe P. Lane, Esq., L. B. Haselden, Esq., plaintiff's attorneys.

15 The following is a transcript of the record of the trial of the case on its merits before his Honor, Judge Thomas S. Sease:

Testimony.

Heard July 8, 1913, before Hon. T. S. Sease, presiding Judge, and a jury.

J. P. Lane, for the plaintiff; Henry Buck, for the defendant. Pleadings read.

R. W. GLENN, sworn, testified as follows:

Direct examination.

By Mr. LANE:

Q. Mr. Glenn, where do you live?
A. In Latta.
Q. In this county?
A. Dillon county.
Q. Mr. Glenn, on or about the 21st day of November, 1911, did you purchase any cattle in Chester?
A. Yes, sir.
Q. About how many cattle?
A. About thirty-eight beef cattle and five milch cows and five calves.
Q. This is the bill of lading under which they were shipped?
A. Yes, sir.

Offered in evidence, and marked Exhibit A.

Q. How long were those cattle on the road, Mr. Glenn?
A. From Tuesday morning until Friday morning.
Q. They were shipped on the 21st?
A. Yes, sir; and arrived on the 24th.
Q. What was the condition of the cattle when they arrived in Latta, Mr. Glenn?
A. They were in bad condition.
Q. Tell the jury what condition they were in?
A. Well, on their arrival—I had five of the milch cows sold on their arrival—(interrupted).

Objected to.

Mr. BUCK: We object. He could not recover special damages without having alleged notice of such special damages at the time of the shipment.

16 The COURT: I think that is true, but I did not understand this testimony to be going to that point.

Q. Go ahead, Mr. Glenn.
A. Well, on their arrival I had engaged to sell them, you know——
Q. Leave that out.
The COURT: He asked you the condition the cattle were in.
The WITNESS: They were poor, and looked like they had not been fed, gaunt, skinned up and bruised. One of them was down in the car. I did not want to take them. I was advised by the agent to

take them off of the train and do the best I could with them, and get medicine and doctors, and do the best I could, that he would see that all the damages were paid.

Objected to.

The COURT: I don't think the statement of the agent as to paying him anything would bind the railroad, as to the railroad's liability, but anything showing that the railroad had knowledge of the condition of the cattle I think would be competent.

Q. All right, Mr. Glenn, what was the particular condition of the milch cows?

A. Why, the milch cows were in very bad condition. I could not get any of them to milk, the bags were hard. I could not sell any of them. I had to dry them up and use them for beef.

Q. I only wanted to find out their condition when they arrived there.

Objected to.

Mr. BUCK: I move to strike that out.

The COURT: I think my ruling covers the objection. In other words, the jury will be charged that he can not recover for any special damages.

Q. The condition of those cattle was they were in bad condition, the bags were what?

A. Skinned up and bruised.

Q. Were the cows sick?

A. Yes, sir; they were fevered.

17 Q. How about the beef cattle?

A. Why, they were in bad condition. I could not use them for a couple of weeks.

Q. Did they look like they had had, or not, rough usage?

Objected to.

The COURT: I think he will have to state the facts, and let the jury infer what usage they had.

Q. What was the appearance of the beef cattle as to their physical condition?

A. They were gaunt, and looked like they had lost a lot of flesh.

Q. Mr. Glenn, you have dealt in cattle for sometime, haven't you?

A. For five years.

Q. You are capable of judging cows, as to their condition?

A. Yes, sir.

Q. As to loss of weight, or what weight it had, what it weighed on foot?

A. I can come near to it.

Q. You saw these cattle before they were shipped?

A. Yes, sir.

Q. In other words, you bought them there?

A. Yes, sir.

Q. In Chester?

A. Yes, sir.

Q. Mr. Glenn, to compare these cattle with their condition in

Chester and their condition in Latta, what would you estimate the loss in weight of those cattle?

A. I think they lost a hundred and fifty pounds.

The COURT: A hundred and fifty pounds a piece?

The WITNESS: The food was out.

The COURT: I said a hundred and fifty pounds a piece?

The WITNESS: I would not say over a hundred pounds.

Q. As much as a hundred pounds each?

A. As one hundred pounds.

Q. Each?

A. Yes, sir; each.

Q. As to the value of these cattle, Mr. Glenn, what did you pay for them. What did you pay for the thirty beef cattle per pound in Chester?

A. Three and a half cents.

Q. How much did they weigh, Mr. Glenn?

A. Twenty thousand pounds, I think, as close as I can recollect.

18 Q. Mr. Glenn, were those cattle worth more in Latta than in Chester?

Objected to, on the ground that under the terms of the bill of lading, the standard is fixed.

The COURT: Mr. Lane, this being an intrastate shipment, are you not bound by the terms of the agreement?

Argument pro and con.

The COURT (addressing Mr. Lane): I think I will rule against you. Go on. Note the exception.

Q. Mr. Glenn, the value of those cattle in Chester was, as you say, three and a half cents a pound?

A. Yes, sir.

Q. Do you remember exactly how much you paid for the whole lot of cattle?

A. Nine hundred and fifty dollars.

Q. For the beef cattle and also for the milch cows?

A. Also for the milch cows.

Q. Mr. Glenn, what did you pay for the milch cows a piece?

A. They cost me fifty dollars.

The COURT: How many milch cattle did you have?

A. Five.

Q. Did you pay the feed bill for those cows?

A. Yes, sir.

Q. How much feed bill did you pay?

A. Sixteen dollars, I think that was the amount.

Q. And did you afterwards have a conversation with the agent of the Atlantic Coast Line at Latta as to this feed bill?

A. Yes, sir; he told me to pay the feed bill, and they would refund the money.

Objected to, on the ground that any effort to make a settlement of this claim would be incompetent.

The COURT (addressing witness): This was the agent at Latta you had the conversation with?

A. Yes, sir.

The COURT: At the time of the delivery of the cattle?

A. At the time I had to pay the freight bill.

The COURT: Was that before they were delivered?

A. It was after I got them.

19 The COURT: How long afterwards?

A. I don't recall now; a day or two, when I settled for the freight.

Mr. BUCK (addressing witness): Mr. Glenn, you filed a claim with the Atlantic Coast Line Railroad Company on December 11, 1911, didn't you?

A. I disremember.

Q. Look at that.

A. Yes, sir.

Q. Now, the time you are talking about is some offer that was made by Mr. Cox in January, 1912, isn't it?

A. Yes, sir; I think it was.

Mr. BUCK (addressing Court): That is our view.

The COURT: The objection is sustained.

(By Mr. LANE:)

Q. You filed this claim; this is your signature?

A. Yes, sir.

Offered in evidence, and marked Exhibit B.

Q. Mr. Glenn, when those cattle were delivered at Latta, did you have any conversation with the agent about filing a claim?

A. Yes, sir; I did not want to take the cattle; they were in such bad shape.

Q. You refused to take them at first?

A. Yes, and he advised me to take them and do the best I could with them; he did not want to have any trouble about it.

Q. The cattle came on the 24th of November?

A. Yes, sir.

Q. And the claim is dated the 11th of December?

A. Yes, sir; the reason I didn't at first was he advised me to wait and see how we would get out with them. The cattle were in such bad condition he wanted me to get medicine and doctor them up. He told me to buy medicine at the drug store and get any cattle doctor or anybody to look after the cattle——

Objected to.

The COURT: I think it is competent. Note the exception.

Q. So, Mr. Glenn, did that claim pretend to cover all the damages at that time?

A. No.

Objected to.

20 Mr. BUCK: Here is the claim he put in, and now he wants to go behind that.

The COURT: I think it is competent.

Q. Go ahead, Mr. Glenn.

A. Why, there was two of them died later on, you know, and he advised me to wait and see what was going to happen.

Q. Two of the cattle died after that time?

A. Yes, sir.

Q. Mr. Glenn, do you remember about what those cattle that died weighed? About what were they worth?

A. They would be worth about twenty or twenty-one dollars, and twenty-eight dollars.

Q. Mr. Glenn, about what was the lowest weight steer in that lot?

A. I reckon nearly five hundred pounds. They weighed five hundred to nine hundred pounds.

The COURT: One twenty-one dollars and the other twenty-eight dollars?

A. Yes, sir; I mean that is on their feet.

Q. Has the defendant ever adjusted or paid for this claim that you made up?

A. No, sir.

Q. Did they ever trace the shipment and inform you where and when the damage occurred?

A. No, sir; never did find out anything about it.

Q. Mr. Glenn, could you give a rough estimate of the difference in the value of those cattle in bulk at Chester, and their value after the damage?

Objected to.

Q. That is, basing your estimate on their value at Chester, what was the difference in the value of those cattle before injury and after injury by the railroad?

A. Looked like it was nearly half.

Q. And you say those cattle were worth nine hundred and some dollars; why didn't you file your claim immediately on the arrival of the cattle?

A. I was advised by the railroad people—by the agent—to see what condition I could get them in, whether they would die, or what would happen.

Q. Why didn't you file another claim after these steers
21 died, and after the other damages developed?

A. Well, he advised me to wait and see.

The COURT: He means after you waited and saw.

Q. Why didn't you file another claim over and beyond your hundred and forty-one dollars?

A. Well, he advised—disremember what happened at that time. I thought that I had filed the claim.

Q. Did he or not tell you all the time during this delay that the matter would be adjusted at once?

A. Yes, sir.

Q. And that they would tend to all the damages?

A. Yes, sir, that they would get the medicine and pay for that.

Objected to, on the ground that it would not be within the scope of the agent's authority.

The WITNESS: You see they had my papers then.

Q. They had your bill of lading?

A. Yes, sir, and other papers.

Q. Mr. Glenn, were these cattle in fat and good condition at Chester?

A. Yes, sir.

Cross-examination:

Q. Mr. Glenn, you did not weigh any of these cattle in Chester, did you?

A. Yes, sir.

Q. All of them?

A. All but the milch cows.

Q. Did you buy them by weight?

A. No, sir.

Q. Please explain to the Court—you bought them from W. A. Hardin?

A. Yes, sir.

Q. "Please send me the weight you have; there is five I have to settle for by the weight."

A. That was some he had bought. I weighed them, and he was paying for them.

Q. You weighed them in Chester?

A. Yes, sir.

Q. And did not give him the weights?

A. I had the weights, and there was five he had bought.

Q. Why did he sign the bill of lading? He was acting for you when he signed that?

A. Yes, sir, we had done weighed them and put them in the pen.

22 Q. Mr. Glenn, in your complaint you alleged that as the direct result of the wilfulness aforesaid all of the said cattle was made sick and weak, and that two of said beef cattle died within ten days after the defendant delivered same?

A. Why, it was something like that.

Q. You swore to that in your complaint; is that your signature? You swore to it, didn't you?

A. Yes, sir.

Q. And you allege in paragraph five that two of the said beef cattle died within ten days after the defendant delivered them; is that right?

A. Yes, sir; I guess so.

Q. And they were delivered to you on November 24, 1911?

A. Yes, sir.

Q. At what time of day?

A. Nearly ten or eleven o'clock.

Q. And yet you filed a bill on December 11, 1911, which was seventeen days after their arrival, and don't say anything about

those two cattle that died. Is there anything in that bill about the two steers dying?

A. No, sir.

Q. Nothing in there about it, is there?

A. No, sir.

Q. Mr. Glenn, you paid two feed bills?

A. Yes, sir.

Q. Who was the agent at Latta?

A. I don't know whether I paid two or one; I paid sixteen dollars.

Q. Who was the agent at Latta?

A. Mr. Johnson Bethea.

Q. Mr. Glenn, didn't Mr. Bethea tell you at the time that the delay of these cattle was on the Southern Railway, and that there were two feed bills?

Objected to.

The COURT: It does not make any difference where it occurred, but he is laying the foundation for a contradiction. The question is competent, though.

Q. Didn't he tell you that the delay was on the Southern Railway at the time, and that there were two feed bills by the Southern Railway?

(No answer.)

Q. At the time you settled for the feed bills?

A. I don't remember what he said about the feed bills. He said there was a feed bill.

23 Q. Didn't he tell you there were two feed bills?

A. I don't remember about two. He said it was sixteen dollars.

Q. Didn't he tell you the last was on the 23d day of November at four-thirty in the afternoon?

A. I don't think he said anything about that.

Q. Have you got your freight receipts?

A. Yes, sir; I reckon I have. I don't know where they were fed. They did not tell me where they were.

Q. After the cattle arrived, didn't Mr. Bethea make an investigation and tell you the next day, or in a day or two, that the delay was on the Southern Railway?

A. I don't think it was a day or two afterwards. I don't know what day it was I paid the feed bill now.

Q. Wasn't it at the time you paid the feed bill that he told you that the delay was on the Southern Railway?

A. I don't think he said anything about where the delay was.

Q. Do you deny it?

The COURT: That gives you the right to contradict him.

Q. Those five milch cows had calves, didn't they?

A. Yes, sir.

Q. And yet you alleged that even though they were penned in the car with the calves that they went dry on account of not being milked?

A. I reckon that was the cause of it, because they were in good condition when I bought them.

Q. You want the jury to believe that, when the calves were with them all of the time?

A. Well, you know the calves were in the car, but they could not get to the cows.

Q. Now, how much damage have you got figured for each of those cows?

A. I figured half.

Q. I want you to make up for me a statement of where your damage came in? I have never found out yet.

A. I valued the milch cows at twenty-five dollars.

Q. Five milch cows at twenty-five dollars. You lost two steers, didn't you? And you said one of them was worth twenty-one dollars, and the other twenty-eight. How did you get at that?

24 A. I figured out that was what they were worth.

Q. Was the valuation at three and a half cents a pound? Is that valuation of twenty-one dollars at three and a half cents a pound?

A. They were worth more than three and a half cents to me in Latta.

Q. At three and a half cents, what was the twenty-one dollar steer you have in here worth?

A. It would weigh about nine hundred pounds, or close to it, the one valued at twenty-eight dollars.

Q. That is a good deal more than twenty-eight dollars, isn't it?

A. I did not say it did weigh that, around it.

Q. You are guessing at these weights, are you not?

A. I buy that way a good deal.

Q. How much would the twenty-one dollar steer weigh that died?

A. He would weigh six or seven hundred pounds.

Q. You say you had forty-six other cattle damaged in the sum of two hundred and fifty dollars. Were they all damaged alike?

A. They were all pretty well skinned up. I could not use them for two weeks.

Q. Were they all damaged alike?

A. No, sir, not all alike; some would be one way and some another.

Q. Some damaged more and some less?

A. Yes, sir.

Q. Were there any not damaged at all?

A. No, sir; all were fevered and skinned and gaunt.

Q. You then lumped the whole thing together at two hundred and fifty dollars for those forty-six, is that right?

A. Yes, sir.

Q. Have you figured up to see how much that amounts to?

A. I have not figured on it lately, it has been so long.

Q. Were all of those cattle about the same size?

A. No, sir; some large and some small.

Q. Do you know that you paid an average for those thirty-six beef cattle of eighteen dollars and thirty-four cents a piece?

25 A. I did not figure it; I know what I paid for the whole carload.

Q. Do you know that if you were to accept as true that every one of them lost a hundred pounds, that you would have only lost one hundred and thirty-three dollars?

A. Well, what about I did not have anything to run the market with, I did not have any beef?

The COURT: No, that is not competent.

Q. What are you going to say about that. Thirty-eight hundred pounds at three and a half cents amounts to a hundred and thirty-three dollars, and yet you swore it was two hundred and fifty dollars?

A. Well, what about the medicine and other things?

Q. You don't ask for any medicine in the complaint.

A. No, but the agent advised me to get it.

Q. Answer my question. There is thirty-eight hundred pounds at three and a half cents, makes one hundred and thirty-three dollars, and yet you say you were damaged two hundred and fifty dollars?

The COURT (addressing witness): Answer the question.

The WITNESS: What was the question you want me to answer?

Q. I say you say you were damaged two hundred and fifty dollars for thirty-eight cows, for thirty-six cows, that is two cows less, about a hundred and twenty-seven dollars. Now, Mr. Glenn, if there were thirty-six cattle and each of them lost one hundred pounds, you would have lost about one hundred and twenty-seven dollars, and yet you swear it was two hundred and fifty?

A. That is the weight; but the cows were bruised up.

Q. You said one hundred pounds, at three and a half cents a pound.

The COURT: You say the cows were bruised up?

A. Yes, sir. It would take a lot of feed to fill them cows like they were.

26 Q. And thirty-eight cows would cost you an average of eighteen dollars and forty-four cents, and yet the steers that died were worth, one twenty-eight dollars, and one twenty-one dollars?

A. The agent, I think, saw them; he can tell you.

Q. How do you count that the cow that died was worth ten dollars more than the average price?

A. It was worth more than that.

Redirect examination:

Q. If the cattle had lost one hundred pounds, would three and a half cents for that hundred pounds, be the entire value of the damage to the cow?

A. How is that?

Q. If a cow has lost one hundred pounds, is that cow damaged for sale entirely—is it worth anything really?

A. It ain't worth anything in that shape.

Q. These were not worth anything in that shape?

A. Not a thing.

Q. And you say that those cows were in good condition when you bought them?

A. When I bought them.

Q. What did you do with the milch cows, Mr. Glenn?

A. I done the best I could with them. I kept them for a month or two and fattened them up, and had to butcher them.

Q. Mr. Glenn, as to the ten days, do you know exactly how long after those cattle arrived at Latta, do you know as to the number of days at all before the other cattle died?

A. I could not hardly remember how many days it was.

Q. Could it have been a month after they arrived?

Objected to, on the ground that the witness can not go behind the allegation of his complaint.

The COURT: A man may be mistaken as to the allegations of his complaint. He swore to his complaint on information and belief.

27 W. W. SELLERS, sworn, testified as follows:

Direct examination:

Q. Where do you live, Mr. Sellers?

A. I live at Latta, sir.

Q. Mr. Sellers, did you see these cattle when they arrived at Latta?

A. Yes, sir.

Q. In what condition were they?

A. In pretty bad shape. I especially was looking for the cows on account of a milch cow. I was down there when they unloaded them. I hardly ever saw anything like that.

Q. Did they look like they had been fed or watered?

A. They looked mighty hollow to me, and the cows looked like they had not been milked, or the calves had not sucked for sometime. They were in pretty bad shape. I don't know anything of the condition they were in before.

Q. Were the bags in bad shape?

A. Yes, sir; I tried two of them.

Q. What did you do with them?

A. I let him have them back. They would not give any milk.

A. G. BETHEA, sworn, testified as follows:

Direct examination:

Q. Mr. Bethea, did you see these cattle when they arrived at Latta?

A. Yes, sir.

Q. Do you live in Latta?

A. Yes, sir.

Q. What was their condition, Mr. Bethea?

A. They were in bad condition.

Q. Describe their physical condition?

A. Well, their bags seemed to be fevered, and there was one down, and the cows were very hollow.

Q. Did they look like they had been fed or watered?

A. If they had, it had been sometime.

28 Q. Did they look like they had been kept crowded in the cars or not, sometime?

A. Yes, sir.

Q. Were they weak and sick?

A. I don't know about being sick. They were very weak, some of them especially.

Q. What was the condition of the milch cows?

A. Why, the milch cows' bags were fevered up. In fact, we tried a couple of cows, but had to return them.

J. B. McCUTCHEON, sworn, testified as follows:

Direct examination:

Q. Mr. McCutcheon, did you see any of these cows off of the car?

A. I did not see them when they first came in.

Q. Did you see them afterwards?

A. Only one that I remember.

Q. What was that?

A. A milch cow.

Q. In what condition was the cow in?

A. I suppose it was several days after she had been shipped in. I think she had been on trial at Mr. Sellers' a day or two as a milch cow, and he returned her to Mr. Glenn, and I took her home with a view to trading him my milch cow that had gone dry for her, but my wife would not have her, and I did not blame her. She asked me to return her at once; she would not drink the milk of such a cow.

Q. What was the trouble with her?

A. She was very poor; looked like she had not long had a calf. She said she did not want a poor cow.

Q. Did she give any milk?

A. Yes, sir; some. No such a milch cow as we wanted.

Q. And you returned the cow to Mr. Glenn?

A. Yes, sir; we sent her back.

Plaintiff closes.

29 *Defense.*

A. W. SELLERS, sworn, testified as follows:

Direct examination:

Q. Mr. Sellers, where were you employed in November, 1911?

A. By the Atlantic Coast Line Railroad Company.

Q. Where?

A. In Columbia.

Q. In what capacity were you employed?

A. Yard conductor.

Q. Does or not the Atlantic Coast Line Railroad Company connect at Columbia with the Southern Railway Company from Chester?
A. Yes, sir, it does.
Q. As yard conductor, did you handle car 2 M. & S., 1009?
A. Yes, sir, I did.
Q. Can you tell me at what hour and on what day that car was delivered to the Atlantic Coast Line Railroad Company by the Southern Railway at Columbia?
Objected to. Objection overruled. Exception noted.
Q. At what hour was the car covered by this bill of lading delivered by the Southern Railway to the Atlantic Coast Line in Columbia?
A. At seven p. m., November 23, 1911.
Q. At what hour was the car forwarded from Columbia?
A. At eleven p. m., on the same day.
Q. Do you know what hours the records of the Southern Railway show that the cattle were fed?
A. No, sir, I do not.
Q. You are going by your record as to the time of delivery?
A. Yes, sir.
Q. Have you a record made by yourself showing that that is positively the time?
A. Yes, sir.
Q. And forwarded at what time?
A. Eleven p. m.

Cross-examination:

Q. Are you employed by the Atlantic Coast Line?
A. No, sir; I am employed by the Seaboard Air Line.
Q. You were at that time?
A. Yes, sir, I was at that time.

Redirect examination:

Q. What conductor carried that train out from Columbia?
A. Conductor Austin.

J. D. AUSTIN, sworn, testified as follows:

Direct examination:

Q. Mr. Austin, what position did you hold with the defendant company in November, 1911?
A. Conductor.
Q. Freight conductor?
A. Yes, sir.
Q. As such, did you handle the car mentioned under that bill of lading?
A. 2 M. & S., 1009.
Q. Where did you handle it from and to?
A. Columbia to Florence.
Q. At what time did you leave Columbia with that car?
A. Eleven-five p. m.

Q. At what time did you arrive at Florence?
A. Six-twenty a. m.
Q. What day?
A. I left on the 23d, and arrived on the 24th.
Q. And arrived when?
A. At six-twenty a. m., on the 24th.
Q. While the car was in your custody, was there any rough handling?
A. No, sir.
Q. Did you have any switching to do?
A. No, sir; not a bit, except a pick up at one point, and this car was the second car on the train.

Cross-examination:

Q. You are in the employ of the Atlantic Coast Line Railway Company?
A. Yes, sir.

31 W. D. POLK, sworn, testified as follows:

Direct examination:

Q. Mr. Polk, by whom were you employed in November, 1911?
A. By the Atlantic Coast Line, yard master at Florence.
Q. As such, did you have car 2 M. & S., 1009?
A. Yes, sir.
Q. Can you tell me when it arrived in Florence?
A. By our train, at six-twenty a. m.

The COURT: Any objection to this testimony?
Mr. LANE: I object to all this testimony, as showing that it did not occur on the Coast Line.
The COURT: Note the objection.

Q. At what time did you say it was forwarded from Florence? At what hour?
A. It was forwarded from the yard at seven-five.
Q. Would that be different from the tower?
A. About twenty or twenty-five minutes.
Q. By what conductor?
A. Conductor James.
Q. Was the stock unloaded at the Florence yard?
A. It was not.
Q. So far as you know, did it have rough handling there?
A. None that I know. I followed the car through the yard pretty closely.

C. J. JAMES, sworn, testified as follows:

Direct examination:

Q. By whom, and in what capacity, were you employed in November, 1911?
A. Freight conductor, Atlantic Coast Line.

Q. As such, did you handle car 2 M. & S., 1009?
A. Yes, sir, from Florence to Latta.
32 Q. While in your care, did it have any rough handling?
A. No, sir, none whatever.
Q. Have you the records of that train?
A. Yes, sir.
Q. At what time did you leave Florence?
A. Seven-thirty.
Q. Was that from the tower or yard?
A. From the tower.
Q. What time did you arrive at Latta?
A. I don't know. I have not a record; I suppose about nine-thirty or ten o'clock.
Q. Was there any rough handling while in your hands?
A. No, sir.

Cross-examination:

Q. Do you remember that particular car?
A. Yes, sir.
Q. Out of all those cars?
A. Yes, sir.
Q. Have you been in the habit of handling a great many cars since you have been in the employ of the Atlantic Coast Line?
A. Not very many stock cars.
Q. You don't have stock very often?
A. No, sir.
Q. Do you remember all the cars and all the kinds that you handle, especially as to whether they are handled rough or not?
A. If there had been any rough handling, I would have had a record of it.
Q. You have no record?
A. No, sir.
Q. You are an employee of the Atlantic Coast Line Railroad Company?
A. Yes, sir.

Redirect examination:

Q. Have you a record of car 2 M. & S., 1009?
A. Yes, sir.
Q. In that book?
A. Yes, sir.
Q. And you are testifying from that record?
A. Yes, sir.

33 E. J. Bethea, sworn, testified as follows:

Direct examination:

Q. Mr. Bethea, by whom and in what capacity were you employed in November, 1911?
A. Employed by the Atlantic Coast Line as agent at Latta.

Q. Can you tell me from the records of your office, the records of the shipment, of car 2 M. & S., 1009, where that cattle was fed?
A. Yes, sir; the record shows.

The COURT: Did you make that record?
A. No, sir; I made the record from the bills I got from Columbia; that is, the original bill from Columbia. It was brought by the conductor.

Objected to. Objection sustained.

Q. Did you present a bill to the consignee, R. W. Glenn, for feed?

Objected to. Objection overruled.

Q. Did you present any bill to the consignee for feed?
A. I did.
Q. How many times?

The COURT: The bills speak for themselves.

Q. Did you tell the consignee when and where the stock was fed?
A. I did.
Q. What did you tell him?
A. About the feeding?
Q. Yes.
A. Well, I told him it was delayed by the Southern Railway in Columbia.
Q. When did you tell him that?
A. Right after arrival.
Q. What did you tell him about the feed bill?
A. I told him on account of the cars, they had to be unloaded again and fed, on account of the scheduled train not moving at that time.
Q. Did you tell him how many times they had been fed?
A. I told him twice; I do not know that I told him the hour of the day.
34 Q. Did you tell him that the delay was with the Southern Railway?
A. I did, and I traced it. I think my records will show that.
Q. Mr. Bethea, do you recall whether any of the cattle were down when the car arrived?
A. No, sir; I did not see any.
Q. You did not see any down?
A. No, sir; I expected them to be down.
Q. Is that the claim that was presented?
A. Yes, sir.
Q. How long were you agent at Latta?
A. Four years.
Q. What time did you leave there?
A. I left there on the 26th day of February.
Q. What year?
A. 1912.
Q. During that time did you hear anything of two of the beef cattle having died?

A. Yes, sir; I was advised of it; Mr. Glenn told me of it.
Q. Was that before or after the filing of this bill, do you recall?
A. I think, as well as I can recall, it was before that bill was filed.
Q. As well as you can recall?
A. Yes, sir; I think that my record will show that two of them died.

Cross-examination:

Q. Mr. Bethea, you are not certain as to Mr. Glenn's informing you about the death of those cattle before or after that claim was filed?
A. Yes, sir; I am certain he informed me of it.
Q. This was more than a year ago, wasn't it?
A. Yes, sir.
Q. And you are absolutely certain that Mr. Glenn reported to you the death of these cattle before the claim was filed?
A. Yes, sir.
Q. Mr. Bethea, did Mr. Glenn ask you to find, was Mr. Glenn at your office every day between the 21st of November, practically every day, very often, trying to get you to find where those cattle were?
A. He did come to find out; he came in there on the passenger train.
Q. Did you find where they were?
A. Yes, sir, and advised him.
Q. You are positive that you informed him between the 21st and the 24th where the cattle were?
A. I think I informed him on the night probably of the 23d, or may be early that morning. I do not remember positively, but he was informed.
Q. As a matter of fact, Mr. Bethea, didn't you find out that they were in Florence on the 24th?
A. I found out where they were. I can not remember the date; my records ought to show.
Q. Your recollection was so good a few minutes ago.
A. We found out where they were before they arrived; I remember that.
Q. Mr. Bethea, you saw those cattle when they arrived?
A. I did.
Q. They were damaged?
A. No, sir; if they were I could not see it.
Q. No damage at all?
A. No, sir.
Q. They were in first-class condition?
A. I considered them so. I am not a cattle man. They all walked out of the car, and there was nothing said about damage.
Q. Nothing was said to you that day about damage?
A. No, sir; I do not recall that anything was said that day.
Q. You did not tell Mr. Glenn on the day of the arrival of these cattle to take them and attend to them, and report his damage to you?

A. Not on that day I did not. There was something said about medical attention after he found out that they were damaged.

Q. Did Mr. Glenn object to taking the cattle?

A. He anticipated that the cattle would be in bad shape, being delayed in transit.

Q. But he did not object at all?

36 A. Not after he saw them. I expected him to on account of the delay, but he was satisfied when he came and saw them, that they were all up.

Q. And you positively did not tell him to take care of those cattle, and to take them, after he objected?

A. No, sir; not in that way.

Q. You did not tell Mr. Glenn to doctor these cattle and take care of them the best he could on the 24th?

A. No, sir; not on the 24th I did not.

Q. You just testified that there was something said about medicine, didn't you?

A. Not on that day.

Q. Was it very much after that?

A. I reckon three or four days after that he came to me in great distress.

Q. What did he tell you?

A. He asked me to come and look at his cows.

Q. Did you go?

A. I certainly did.

Q. Didn't they look damaged then?

A. They were in bad condition then. Some were down around the lot there. I do not know whether they were the same cattle or not; all cattle look alike to me. There were some cattle there that looked like they were sick.

Q. There were some on the ground sick?

A. Yes, sir, some; I do not know how many.

Q. And when you went it was to see them? On the day that you went to Mr. Glenn's and found those cows sick in the yard, you did not tell him to doctor them?

A. Well, wouldn't you tell anybody to doctor a cow if it was sick?

Q. Didn't you tell him to doctor the cows and take care of them?

A. I told him to doctor them.

Q. Did you go further and tell him that the railroad would adjust it?

A. No, sir; I could not tell him that. I told him it was out of my power. I told him I would accept his claim and send it in to be investigated. I had no right to decline it.

Q. Had Mr. Glenn paid the freight up to that time when

37 you went to see them?

A. I did not recall, but I think the record will show when he paid the freight.

Q. You have not got those records, have you?

A. I think so. He has the original record that will show the date it was paid. I suppose you have it in your possession.

Q. Do you remember whether they were paid for on the day they arrived?

A. I don't think I collected the freight right at that time.
Q. You say you collected sixteen dollars for feeding those cattle?
A. Yes, sir.
Q. Would you say that sixteen dollars' worth of feed would feed forty-eight head of cattle from the 21st until the 24th day of November?
A. I would say so. From what date?
Q. From the 21st day of November until the 24th, would sixteen dollars buy enough feed to feed forty-eight head of cattle?
A. Why, I would think so.

Defense closes.

Reply.

R. W. GLENN, recalled, testified as follows:

Direct examination:

Q. Mr. Glenn, when those cattle arrived and you took them to your stockyard, did you have any other cattle?
A. No, sir; I was plum out at that time. I was buying around that week to run the market. I did not have a one.

Objected to. Objection sustained, except as to the reply to the statement of the last witness.

Q. Mr. Glenn, between the 21st and the 24th of November, did you go to Mr. Bethea a number of times to find out where these cattle were?
A. Yes, sir; I went two or three times a day to find out where they were.
Q. Did he attempt to find out where they were?
A. I reckon he knew, but he would not report it to me,
38 not until the morning of the 24th, I think. I asked the operator, and he said that the car had arrived in Florence.
Q. He said when you paid him the feed bill that he told you where the damage occurred——

The COURT: I think you have already gone over that, Mr. Lane.

Cross-examination:

Q. When was the first time you found out that the delay was with the Southern Railway?
A. Why, I never did find out where the delay was.

Mr. BUCK: Mr. Lane, please give us the letter that we gave you notice to produce.

Q. Did you receive that letter?
A. Yes, sir.

Offered in evidence and marked Exhibit C.

—. About the date of that letter there, February 16th?
A. I don't remember what date I got the letter.

Q. You were mistaken, therefore, just now, were you not? You received that letter?

A. Yes, sir.

Q. And that told you there was no delay with the Coast Line?

A. I did not know who else to get into communication with but the agent at Latta.

Q. But you were advised in that letter that the delay was with the Southern Railway, were you not?

A. Yes, sir; I reckon so.

Mr. Buck: May it please the Court, we ask the Court to direct a verdict for the defendant, on the grounds:

First. That Section 2574 does not apply to contract of shipment in this case which was based upon a valuable consideration, to wit: a reduction in freight rate.

Second. That Section 2574 is unconstitutional and void, in that said section as applied to this action is in contravention of Article I, Section 5, of the Constitution of South Carolina, and the Fourteenth Amendment to the Constitution of the United States, in that
39 said section deprives the defendant of the right of contract, and deprives it of property without due process of law, making it responsible for the debts and liabilities of another, without giving it adequate redress against such other.

Third. That Section 2574, construed with Section 2575, is in contravention of said sections of the Constitution of South Carolina and the Contsitution of the United States, in that said section while purporting to make the carrier really at fault responsible to the deefndant, yet they together deprive the defendant of its property without due process of law, in that no provision is therein contained whereby defendant can obtain compensation for its loss of time in defending suit against it, or the expense of defending such suit, and its attorneys' fees.

Fourth. That the evidence in this case conclusively shows, and there is no other inference that can be drawn from it, that there was no delay with the Atlantic Coast Line Railroad Company.

Fifth. That even if said sections of the Code be held constitutional, that under the allegations of the complaint in this case, the plaintiff having seen fit to bring his action under another section of the Code, and alleging the contract to be that as set forth in paragraph 9 of the complaint, we are entitled to make proof, and entitled to the legal position that those sections do not control.

The Court: All of the grounds are overruled.

Judge's Charge.

Mr. Foreman and Gentlemen of the Jury: You are the judges of the credibility and the force and the effect of the testimony. The law makes you the sole judges of the testimony. I cannot aid you in reaching your verdict when it comes to the conservation of the testimony. All that I can do is to state the issues as made by the plain-

tiff and the defendant; the plaintiff by his complaint, replied
40 to by the defendant's answer. The plaintiff alleges that he has been damaged as set forth in his complaint by reason of the fact that he delivered to the Southern Railway Company, a connecting carrier with the defendant, Atlantic Coast Line Railroad Company, certain cattle, which, if I understand the answer, were delivered to the Southern Railway Company at Chester, and that the defendant was negligent, and regardless of its duty as a common carrier, negligently and carelessly handled the said cattle while upon its road and under its care, and negligently and carelessly kept said cattle confined in the car without unloading the same for rest, and without watering and feeding the same, from on or about the 21st to the 24th day of November, 1911. That as the direct result of the carelessness and negligence as aforesaid all of said cattle were made sick and weak and that two of the said beef cattle died within ten days after the defendant delivered them, and that the said milch cows went dry immediately thereafter, and that all of said cattle were greatly damaged from the causes aforesaid, and alleges that the two cattle were worth, one twenty-one dollars and another twenty-eight dollars, and certain other damages which will be in the complaint before you. I charge you that the plaintiff is bound by the allegations of the complaint. That is the first cause of action. For a second cause of action the plaintiff alleges under the statute, that he filed a claim for damages to the cattle, and that that claim was not paid within thirty days after the filing, and that therefore he is entitled to recover what is known as the penalty for failure to settle a claim, the penalty being fifty dollars. So his complaint asks for three hundred and fifty dollars, with interest from the date of the filing of the claim, and also he asks for fifty dollars penalty.

I will instruct you, gentlemen, that the plaintiff must prove his right to recover by the preponderance of the testimony, that
41 is, by the greater weight of the testimony. Not the greater number of witnesses, necessarily. You have heard the witnesses, you have heard the testimony of both sides, and arguments of counsel.

The defendant answers the complaint, and denies the material allegations of the complaint, and sets up several defenses here and also sets up the contract under which the shipment was made, which in the main, I instruct you, is binding upon the shipper and consignee, which may be one and the same person. I charge you, however, that no contract of shipment in the shape of a bill of lading is binding upon the shipper or the consignee, which purports to limit, or rather which purports to contract against the common carrier's negligence. The clause in the bill of lading in shipments of this kind which limits the liability to a certain sum per head of cattle is binding upon the shipper, and it is conceded by the plaintiff that he can not recover any more per head than the amount stated in the bill of lading, to wit: thirty-five dollars for grown cattle each, that is, for each cow and calf together, for grown cattle each thirty dollars, for yearling cattle each fifteen dollars, and calves each five

dollars. And that is the law, and the plaintiff is bound by the stipulation in the contract.

The answer further alleges that by reason of the contract entered into for valuable consideration, the plaintiff is estopped from claiming or recovering any sum greater than that hereinbefore mentioned for each of said classes.

The fourth defense in answering the complaint sets up the claim: That the contract of shipment, in consideration of a reduced freight rate granted to the plaintiff, that the plaintiff would make claim for any injury to the said live stock, that is to say, would give notice in writing of his claim therefor, to the agent of the carrier actually delivering said live stock, and before said live stock was intermingled with other live stock, and the defendant alleges in its answer that by reason of the plaintiff's failure to comply with that pro-
42 vision, that he is precluded from recovering. I charge you in connection with that that parties to a contract may waive any of its provisions, and it would be a question for you under the testimony in this case whether or not the defendant, through its authorized agents and servants, within the scope of their authority, waived that provision of the contract set out in the bill of lading.

The fifth defense has been stricken out by Judge Gage, on a proper motion therefor. That frames, gentlemen, the issues for you to try. You have heard the testimony, and it is for you to say whether or not the plaintiff is entitled to recover, and if so, what amount. And it is for you to say whether or not he is entitled to the penalty, and on that I charge you that unless the plaintiff is entitled to recover at your hands, that is to say, unless you find for the plaintiff the damage equal to the amount named in his claim that he filed with the railroad company, you can not find fifty dollars penalty for the plaintiff. The statute provides that if on a suit to recover the amount of a claim filed by the plaintiff, the plaintiff does not recover the full amount of that claim, he can not and will not be entitled to recover the fifty dollar penalty. I charge you as a matter of law that the terminal carrier, where damage occurs to freight, if there was damage, the presumption is that the damage occurred on the delivering carrier. Like all presumptions in law, it is a rebuttable presumption. The law of this State, gentlemen, as I understand the statute enacted by the legislature in 1903, makes each railroad in the shipment of goods over more than one of them the agent of the others, and the others the agents of it. I desire to read that section, gentlemen, as I conceive it to be applicable to the phases of the case submitted to you:

"All common carriers over whose transportation lines, or parts thereof, any freight, baggage, or other property received by either of such carriers for through shipment or transportation by
43 such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers, shall in this State, with respect to the undertaking and matters of such transportation, be considered and be construed to be connecting lines, and be deemed and held to be agents of each other, each the agent of the others, and all the others the agent of each, and shall be held and

deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the Courts of this State, any through bill of lading, way bill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute prima facie evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulation, or attempted stipulations to the contrary by such carriers, or either of them."

In other words, I charge you it is the law of this State that the defendant, Atlantic Coast Line Railroad Company, is the agent of the Southern Railway Company in a shipment that goes over both of them, and that the Southern Railway Company is the agent of the Atlantic Coast Line Railroad Company in a shipment that goes over both of them, and the principal is liable for the acts and conduct of its agent.

If you find, therefore, gentlemen, that the defendant was negligent in the handling of the shipment described in the complaint, or if you find that the Southern Railway was negligent in the handling of the shipment as alleged in the complaint, against the Atlantic Coast Line Railroad Company, and you find that that negligence was the proximate cause of the damage, if any, as alleged in the complaint, then you write a verdict for whatever damages you find that the plaintiff is entitled to. In other words, gentlemen, if you find they were negligent on either the Atlantic Coast Line Railroad Company or on the Southern Railway, and that that negligence was the direct and proximate cause of the injury complained of in the complaint, the plaintiff is entitled to a verdict at your hands for whatever damage he sustained by reason of that negligence. And if you find that he is entitled to recover the amount of the claim filed, or more, then you will also give him a verdict for the fifty dollar penalty.

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So the form of your verdict will be, we find for the plaintiff so many dollars, writing it out, or, we find for the defendant. Whatever verdict you write, write it out, and sign it, and date it, and add the word foreman under it.

The two requests to charge of the defendant are refused. Write your verdict on what is known as the summons and complaint. Bring in a sealed verdict, gentlemen. You will write it out, put it in that envelope, and seal it up, knock on the door, inform the bailiff that you have agreed, and he will let you out. You will come back in the courtroom tomorrow morning at nine-thirty.

Defendants submitted two requests to charge as follows:

I. If you find that there was no negligence on the part of defendant or that there was no delay on its line, your verdict must be for defendant.

same, the business of the Railway Company shall not be delayed by the detention of trains to unload and reload said live stock for any cause whatever, but the cars containing the same may be left at a station upon the request of the person in charge, and unloaded and reloaded by him, to be forwarded by the next freight train if he so directs, and the Railway Company shall not be held liable for any damage or injury that may occur to said live stock during the
48 time the same may remain so unloaded and out of the cars as aforesaid, and in case said live stock is kept over at any given point by the party of the second part, or his agents, beyond a reasonable length of time for feeding and watering, then this contract shall be held to be voidable at the option of the Railway Company, and in such case such rates of freight may be imposed and collected by the Railway Company as may be by it deemed proper; not to exceed, however, the local rates from point where received for transportation to such point of detention.

5. That he will indemnify and save harmless the Railway Company against any and all claims of any person against the Railway Company arising out of loss or damage to said live stock while being transported, except such liability as shall accrue by reason of the negligence of the Railway Company, its servants and employees; that *it* to say, among other things, he will so indemnify the Railway Company against claims arising out of loss or injury to said live stock accruing from any of the following causes, whether the same develops during said transportation or afterwards, to wit:

(*a*) The inherent vice, or the wild and unruly condition or conduct of any of the said live stock, including self-inflicted injuries, and the escape of any one or more animals.

(*b*) The inherent defect, weakness or vitality of the live stock.

(*c*) Heat, suffocation or other ill effects of being crowded in cars.

(*d*) The burning of hay, straw or other material used by the party of the second part, or his agent, for food or bedding of said live stock.

(*e*) The breaking of partitions or double decks erected in cars by the party of the second part or at his expense.

(*f*) Delays or detention of said live stock during transportation when occasioned by mob, strike or threatened violence to
49 person or property from any source, or by casual injuries to tracks, yards or rolling stock, or operation of law.

6. That should damage occur for which the Railway Company may be liable, the value at the place and date of shipment shall govern the settlement, but in no event shall the amount claimed or recovered exceed—

For horses and mules, each	$100.00
For mare and colt, together	100.00
For jack and stallion, each	150.00
For cow and calf, together	35.00
For grown cattle (cows and bulls), each	30.00
For yearling cattle, each	15.00
For calves, hogs or sheep, each	5.00

which amounts, it is agreed, are as much as said animals as are herein agreed to be transported are reasonably worth, unless their valuation is expressly written on the face of this contract, and regular unreleased tariff rates are paid. For every increase of 100 per cent. or fraction thereof, in valuation, there shall be an increase of 20 per cent. in the rate.

7. That presentation of this bill of lading shall be sufficient evidence of ownership to relieve and release the Railway Company from all liability on account of wrong delivery of said live stock, but shall not be held to operate against the right of the Railway Company to demand, if it so elect, the identification of the party presenting this bill of lading before delivery of said animals.

8. That as a condition precedent to any right to recover any damage for loss or injury to said live stock notice in writing of the claim therefor shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock.

50 9. That when it may be necessary for said live stock to be transported over the line or lines of any other carrier or carriers to the point of destination, delivery of the said live stock may be made to such other carrier or carriers for transportation upon such terms and conditions as such carrier may be willing to accept: Provided, however, that the terms and conditions of this bill of lading shall enure to the benefit of such carrier or carriers, unless they shall otherwise stipulate.

10. That the responsibility, either as common carrier or warehouseman of each carrier over whose line the property shipped hereunder shall be transported shall cease as soon as delivery is made to the next carrier or to the consignee; and the liability of the said lines contracted with is several and not joint; neither of the said carriers shall be responsible or liable for any act, omission or negligence of the other carriers over whose lines said property is or is to be transported.

F. W. & L. at 9 a. m., 11-21-11.

It is understood and agreed that rates of freight and extent of liability of the Company on shipments of Live Stock are governed by the declared values which shippers place thereon. Rates of freight are on file and will be shown by agents upon application.

Shipper has choice of accepting any of the options shown below:

Option One. Owner's risk, declared values not in excess of values shown in paragraph 6 above, Special Rate, $—.

Option Two. Carrier's risk, except as exempted by law, declared values not in excess of values shown in paragraph 6, above, rate 20 per cent. higher than option one, $—.

Option Three. Owner's risk, declared values in excess of values shown in paragraph 6 above, rate 20 per cent. additional on each 100 per cent. of increase in value, or fraction thereof, $—.

51 Option Four. Carrier's risk, except as exempted by law, 20 per cent. higher than rate according to declared values in option three, $—.

The shipper hereby declares that the value of this stock does not exceed per head:

For horses and mules, each..... $—
For mare and colt, together..... $—
For jack and stallion, each..... $—
For cow and calf, together..... $—
For grown cattle (cows and bulls), each..... $—
For yearly cattle, each..... $—
For calves, hogs or sheep, each..... $—

The shipper further declares that the several options above are sufficiently understood and Option No. — is accepted and the other options rejected without reserve. It is understood and agreed that the rates herein stipulated do not include feed, water and other expenses en route.

The evidence that the party of the second part, after a full understanding thereof, assents to all the conditions of and assumes the obligations of the covenants on his part and expressed in the foregoing contract, is his signature hereto.

W. A. HARDIN,
Owner or Shipper.

Signed, sealed and delivered in the presence of:
J. F. CLOUD.

——— ———.

(To be subscribed by one or more witnesses other than either signer of the contract.)

Southern Railway Company accepted this shipment on the declared values as a basis for fixing rate of freight thereon.

SOUTHERN RAILWAY COMPANY,
By J. R. CRAIG, Jr., *Agent.*

52 Mr. R. W. Glenn.

Dear Sir: I herewith enclose bill of lading R. W. Glenn, Dr., to W. A. Hardin:

5 milch cows, $50 each.....	$250.00
38 beef cattle at 3½ cents.....	715.50
	$965.50

Received payment in full.

W. A. HARDIN.

Please send me the weights if you have then. There was five I have to settle for by their weight.

Yours truly,

W. A. HARDIN.

EXHIBIT B.

Phone 12-L.

LATTA, S. C., Dec. 11, 1911.

Atlantic Coast Line Railroad in Account with

R. W. Glenn.

Beef, Fish and Oysters.

Dec. 11.	Damage to 5 milch cows and calves.....	$125.00
	Feed bill	16.00
		$141.00

These cattle were on the car from Tuesday morning until Friday morning at 11 o'clock. The bags of the cows were ruined, and very much fevered. Cows will not be fit for beef cattle for at least a month. These cows were purchased for parties here in Latta, and had they not been delayed would have sold said cattle on arrival in Latta.

R. W. GLENN.

53 EXHIBIT C.

Atlantic Coast Line Railroad Company.

WILMINGTON, N. C., February 16th, 1912.

Claim No. 178769. Z.

Subject: R. W. Glenn's Claim $141.00.

Mr. R. W. Glenn, Latta, S. C.

DEAR SIR: I beg to acknowledge the receipt of your letter, dated at Latta, S. C., 29th ult., and in reply I beg to advise you that the Southern Railway's Superintendent of Transportation is now endeavoring to make an investigation of the movement over the Southern Railway, and we know this will be concluded at *on* early date, and I have again addressed Mr. Gatchell this date for his full report. The handling over the A. C. L. is clear, and there was no delay at all, the shipment having been delivered us by the Southern Railway at Columbia at 7:00 P. M. on November 23rd, and we made delivery at Latta, S. C., on the following day.

Yours truly,

A. H. SHEPARD,
Freight Claim Agent.

J. F. T.—C. Desk Z.

Exceptions.

I. Because his Honor, Judge Gage, erred, it is respectfully submitted, in refusing to hold that Section 2574 does not apply to the

contract of shipment in this case, which was based upon a valuable consideration, to wit: a reduction in freight rate.

II. Because his Honor, Judge Gage, erred, it is respectfully submitted, in granting plaintiff's motion and in refusing to hold Section 2574 unconstitutional and void, in that said section, as applied
54 to this action, is in contravention of Article I, Section 5 of the Constitution of South Carolina, and the Fourteenth Amendment to the Constitution of the United States, in that said section deprives defendant of the right of contract and deprives it of property without due process of law, making it responsible for the debts and liabilities of another without giving it adequate redress against such other.

III. Because his Honor, Judge Gage, erred, it is respectfully submitted, in refusing to hold that Section 2574, construed with Section 2575, is in contravention of said sections of the Constitution of South Carolina and the Constitution of the United States, in that said section, while purporting to make the carrier really at fault responsible to defendant, yet they together deprive defendant of its property without due process of law, in that no provision is therein contained whereby defendant can obtain compensation for its loss of time in defending suit against it, or the expense of defending such suit, and its attorney's fees.

IV. Because his Honor, Judge Sease, erred, it is respectfully submitted, in not granting defendant's motion for a direction of verdict on the first four grounds stated therein, it being respectfully submitted that Section 2574 of Volume I of the Code of 1912, is unconstitutional, null and void as applied to a shipment under a contract such as that proved in this case, for the reasons set forth in the first three exceptions herein above; and in that the testimony conclusively shows, and no other inference can be drawn from it, that there was no delay with the defendant and no rough handling or damage done by defendant.

V. That his Honor, Judge Sease, erred, it is respectfully submitted, in not holding the said section of the Code unconstitutional for the reasons hereinbefore stated in these exceptions; and that only one inference can be drawn from the testimony, to wit: that
55 there was no delay in the transportation of, or damage done to, the carload of cattle by the defendant, and erred, it is respectfully submitted, in not holding this a complete defense to plaintiff's cause of action.

VI. Because his Honor, Judge Sease, erred, it is respectfully submitted, in not holding that even if the said section of the Code is constitutional, that the allegations of the complaint in this case, the plaintiff having seen fit to allege in paragraph nine of his second cause of action: "That said contract for shipment was over the lines of two or more common carriers, the defendant being one of them and terminal carrier; that said contract provided in effect that the responsibility of each of said carriers should cease upon delivery to its connecting line of said cattle in good order; that the defendant received said cattle under the terms of said contract," conclusively bind plaintiff to the validity of said contract; and the testimony con-

clusively showing as it does in this case, and it being possible to draw only one inference from it, that there was no delay or damage to the shipment by defendant, the defendant was entitled to a direction of verdict, upon and under the allegation of said paragraph 9 of the second cause of action stated in the complaint, and as stated in defendant's fifth ground for motion to direct verdict.

VII. Because his Honor, Judge Sease, erred, it is respectfully submitted, in refusing defendant's requests to charge, in that the contract of shipment in this case was based upon a valuable consideration, to wit: a reduction in freight and contained the provision, "That neither of the carriers over whose lines said live stock should be transported should be responsible or liable for any action, omission or negligence of any other carrier over whose lines said live stock might be transported;" that said section of the Code does not apply to contracts of this nature, signed by both consignor and defendant;
and even if it does, it is unconstitutional, null and void; and
56 even if constitutional, plaintiff having alleged it as a valid contract is bound by his allegations and could not recover.

F. L. WILLCOX,
HENRY BUCK,
Attorneys for Defendant-Appellant.

We agree that the foregoing shall constitute the case on appeal to the Supreme Court, and when printed it shall be filed by way of return.

F. L. WILLCOX,
HENRY BUCK,
Attorneys for Defendant-Appellant.
JOE P. LANE,
L. B. HASELDEN,
Attorneys for Plaintiff-Respondent.

57 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Fourth Circuit, Dillon County.

No. 39.

R. G. GLENN, Plaintiff-Respondent,
against
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Opinion by T. B. Fraser, A. J.

This is an action for injury to cattle shipped from Chester, S. C., to Latta, S. C. The injury is said to have been occasioned by delay and rough handling on the way. The cattle were delivered to the Southern Railway at Chester and by it transported to Columbia, and at Columbia delivered to the Atlantic Coast Line Railroad Company, Appellant.

The Appellant denied that the cattle was injured or delayed through any of its agents and servants, but that the delay or injury,

if any, was caused by the Southern Railway and that it is not responsible for the acts of its connecting line, notwithstanding the provisions of Section 2574 of the Code of 1912, in as much as that Section is unconstitutional.

A motion was made before Judge Gage to strike out that portion of the Answer that pleaded the unconstitutionality of this section. He granted the motion. From this order Appellant appealed. After the return was filed in this Court, the Appellant moved this Court for, and obtained, an order declaring the appeal abandoned. That appeal raised the question as to the constitutionality of this Statute. The case was then tried in the Circuit Court and a judgment was rendered in favor of the Plaintiff.

This appeal is from Judge Gage's order and also from the ruling of Judge Sease, who tried the case. The Respondent claims that the appeal from Judge Gage's order having been perfected and then abandoned, the order of Judge Gage became res-adjudicata and decided the question of the constitutionality of the Statute so far as this case is concerned and — can not be raised again. It is
58 not questioned that the defendant would have had the right to await the judgment in the Circuit Court and then appeal from the order of Judge Gage, but in as much as the defendant perfected his appeal and then abandoned it, the order was res-adjudicata. The record shows that there were two notices given, one by Appellant to be allowed to abandon and the other by the Respondent to dismiss the appeal. If this Court had dismissed the appeal, it might have had the effect claimed, but this Court allowed the Appellant to abandon his appeal and the questions will be considered.

The following are the exceptions:

I. Exception I:

"Because his Honor, Judge Gage, erred, it is respectfully submitted, in refusing to hold that Section 2574 does not apply to the contract of shipment in this case, which was based upon a valuable consideration, to wit: a reduction in freight rate."

The section is as follows:

"All common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers, shall in this State, with *the* respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and be deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the Courts of this State, any through
59 bill of lading, way bill, receipt, check or other instrument issued by either of such carriers, or other proof showing that

either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute prima facie evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them."

There can be no consideration to sustain a provision in a contract when that provision is forbidden by law. This exception is overruled.

II. Exception II:

"Because his Honor, Judge Gage, erred, it is respectfully submitted, in granting plaintiff's motion and in refusing to hold Section 2574 unconstitutional and void, in that said section, as applied to this action, is in contravention of Article I, Section 5 of the Constitution of South Carolina, and the Fourteenth Amendment to the Constitution of the United States, in that said section deprives defendant of the right of contract and deprives it of property without due process of law, making it responsible for the debts and liabilities of another without giving it adequate redress against such other."

Exception III:

"Because his Honor, Judge Gage, erred, it is respectfully submitted, in refusing to hold that Section 2574, construed with Section 2575, is in contravention of said section of the Constitution of South Carolina and the Constitution of the United States, in that said section, while purporting to make the carrier really at fault responsible to defendant, yet they together deprive defendant of its property without due process of law, in that no provision is therein contained whereby defendant can obtain compensation for its loss of time in defending suit against it, or the expense of defending such suit, and its attorney's fees."

60 Section 2575 provides an action against the offending carrier. The only inadequacy complained of is for loss of time in defending an action and for attorney's fees. Except in cases where suits are brought on special contracts, that provide for attorney's fees, these things are never allowed in this State. It would be dangerous doctrine, especially to Appellant, for this Court to say that adequate compensation included attorney's fees. This Exception is overruled.

III. Exception. IV:

"Because his Honor, Judge Sease, erred, it is respectfully submitted, in not granting defendant's motion for a direction of verdict on the first four grounds stated therein, it being respectfully submitted that Section 2574 of Volume I of the Code of 1912, is unconstitutional, null and void as applied to a shipment under a contract such as that proved in this case, for the reasons set forth in the first three exceptions herein above; and in that the testimony conclusively shows, and no other inference can be drawn from it, that there was no delay with the defendant and no rough handling or damage done by defendant."

Exception V:

"That his Honor Judge Sease, erred, it is respectfully submitted, in not holding the said section of the Code unconstitutional for the

reasons hereinbefore stated in these exceptions; and that only one inference can be drawn from the testimony, to wit: that there was no delay in the transportation of, or damage done to, the carload of cattle by the defendant, and erred, it is respectfully submitted, in not holding this a complete defense to plaintiff's cause of action."

Exception VI:

"Because his Honor, Judge Sease, erred, it is respectfully submitted, in not holding that even if the said section of the Code is constitutional, that the allegations of the complaint in this case, the plaintiff having seen fit to allege in paragraph nine of his
61 second cause of action: 'That said contract for shipment was over the lines of two or more common carriers, the defendant being one of them and terminal carrier; that said contract provided in effect that the responsibility of each of said carriers should cease upon delivery to its connecting line of said cattle in good order; that the defendant received said cattle under the terms of said contract,' conclusively bind plaintiff to the validity of said contract; and the testimony conclusively showing as it does in this case, and it being possible to draw only one inference from it, that there was no delay or damage to the shipment by defendant, the defendant was entitled to a direction of verdict, upon and under the allegation of said paragraph 9 of the second cause of action stated in the complaint, and as stated in defendant's fifth ground for motion to direct verdict."

Exception VII:

"Because his Honor, Judge Sease, erred, it is respectfully submitted, in refusing defendant's request to charge, in that the contract of shipment in this case was based upon a valuable consideration, to wit: a reduction in freight and contained the provision, 'That neither of the carriers over whose lines said live stock should be transported should be responsible or liable for any action, omission or negligence of any other carrier over whose lines said live stock might be transported;' that said section of the Code does not apply to contracts of this nature, signed by both consignor and defendant; and even if it does, it is unconstitutional, null and void; and even if constitutional, plaintiff having alleged it as a valid contract is bound by his allegations and could not recover."

a. As to the position that only one inference can be drawn—

This objection can not be sustained.

Lowry vs. Railroad Company, 92 S. C., pg. 42;

"It has been held where a presumption of law arises and there is some testimony to rebut this presumption, it is for the jury and not for the Court to determine upon which side rests the weight." See also, McLeod vs. Railroad, 93 S. C., pg. 71.

62 *b.* As to the constitutionality of Section 2574, it is said in Reynolds & Croft vs. Railway, 81 S. C., pg. 387;

"This statute has been held constitutional as to shipments entirely within the State." Venning vs. A. C. L. R. R. Co., 78 S. C., 42; 58 S. E. 982; 12 L. R. A. (U. S.) 1217.

This shipment was entirely within this State.

c. As to the position that in as much as the plaintiff pleaded the contract, it is bound by all of its provisions. This position can not be sustained. We have been furnished with no authority and we

know of none which holds a man can claim no right under a contract that contains a void provision. The Statute provides that the liability exists notwithstanding a provision to the contrary. This is just the case before us.

The Judgment is affirmed.

We concur:

EUGENE B. GARY, *C. J.*
D. E. HYDRICK, *A. J.*
R. C. WATTS, *A. J.*

[Endorsed:] 8720. State of South Carolina. In the Supreme Court, 4 Circuit, Dillon County. R. W. Glenn, Resp'd't, v. A. C. L. R. R. Co., Appel't. Affirmed. Opinion by T. B. Fraser, A. J. We concur: Eugene B. Gary, C. J., D. E. Hydrick, A. J., R. C. Watts, A. J. Filed Supreme Court of S. C. Jan'y 13, 1914. U. R. Brooks, Clerk.

63 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, November Term, 1913, Fourth Circuit, Dillon County.

Judges Geo. W. Gage and Thomas S. Sease, presiding.

R. G. GLENN, Plaintiff-Respondent,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Order.

Whereas, on the 13th day of January, 1914, a judgment was rendered by this Court affirming the judgment of the Circuit Court in the above entitled action; and,

Whereas, it appears that in rendering said judgment a right or authority exercised or claimed under the Constitution and laws of the United States was drawn in question, to-wit: That Sections 2574 and 2575 of the Code of Laws of South Carolina, making void a contract of a common carrier limiting the right of recovery in case of loss of or damage to property to the line on which such loss or damage occurred, are void under the fourteenth Amendment of
64 the Constitution of the United States; and,

Whereas, it is claimed that said judgment of this court denied the said right or authority claimed under the Constitution and laws of the United States;

Therefore, in order that the defendant may have said question passed upon by the Supreme Court of the United States;

It is ordered, on motion of Messrs. P. A. Willcox, F. L. Willcox, and Henry Buck, Attorneys for Defendant, that the Remittitur herein be stayed sixty days from the date hereof so that the defend-

ant may perfect its appeal to said Court, or take such other action in the premises as it may deem proper.

EUGENE B. GARY,
Chief Justice of the Supreme Court
of the State of South Carolina.

At Chambers, Columbia, S. C., this 20 day of January, 1914.

65 [Endorsed:] 4 Circuit. State of South Carolina, in the Supreme Court. R. W. Glenn, Plaintiff-Respondent, vs. A. C. L. R. R. Co., Defendant-Appellant. Order. Law offices Willcox & Willcox, Florence, S. C. Filed Supreme Court of S. C., Jan. 20, 1914. U. R. Brooks, Clerk.

66 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, November Term, 1913, Fourth Circuit, Dillon County.

Judges Geo. W. Gage and Thomas S. Sease, presiding.

R. G. GLENN, Plaintiff-Respondent,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Petition for Writ of Error.

To the Honorable Eugene B. Gary, Chief Justice of the Supreme Court of South Carolina:

Now comes your Petitioner, Atlantic Coast Line Railroad Company, defendant and appellant in the above entitled cause, and respectfully shows:

I.

That on the 13th day of January, 1914, the Supreme Court of South Carolina, being the highest court of law or equity in said State in which a decision could be had, rendered a final judgment in the above entitled cause, whereby it affirmed the judgment rendered in said cause by the Court of Common Pleas for Dillon County in said State.

67 II.

That in the answer served, on or about the 22nd day of July, 1912, by defendant appellant, there was interposed the following defense appearing therein, as a fifth defense to plaintiff's first cause of action, to-wit:

"First. That on or about the 21st day of November, 1911, the plaintiff caused to be delivered to the Southern Railway Company at Chester, South Carolina, the certain live stock described in the complaint, and that at said time, in consideration of a reduced freight rate granted plaintiff, the plaintiff agreed and contracted with said

Southern Railway Company, which contract by its terms enures to the benefit of the defendant, that neither of the carriers over whose line said live stock should be transported should be responsible or liable for any action, omission or negligence of any other carrier over whose line said live stock might be transported.

Second. That this defendant denies that it was negligent in any manner whatsoever, and alleges that upon the delivery of said live stock to defendant, that this defendant safely and quickly transported same to its destination; that if there was any delay in the transportation of the said live stock, or any damage done thereto, it was not over the lines of defendant; and that, by reason of said contract, fairly entered into, for valuable consideration, this defendant is relieved of any and all liability on account of any damage that may have been sustained by plaintiff from any cause whatsoever."

That thereafter his Honor, Judge George W. Gage, Presiding Judge of the Fourth Judicial Circuit, upon motion duly noticed and made before him by plaintiff-respondent, on February 18th, 1913, at Dillon, South Carolina, made the following order, to-wit:

"On motion of Joe P. Lane, attorney for the plaintiff in the above entitled action, for an order striking out 'all of the fifth defense, to the first cause of action,' in the answer of the defendant; and after hearing Henry Buck, Esq., attorney for the defendant, in opposition thereto; and the constitutionality of Section 2574 of Volume I of the Civil Code of Laws of South Carolina for 1912, on which the motion is based, having been questioned by defendant's counsel, but it appearing to the Court that the statute should stand unless unconstitutional beyond a reasonable doubt, and having such doubt, I hold the statute to be good; and by its terms the statute makes each road the agent for the other, notwithstanding any stipulation to the contrary;

"And it is hereby ordered that 'all of the fifth defense to
68 the first cause of action,' in the answer of the defendant, be stricken out as irrelevant."

That upon the trial of said cause in the Court of Common Pleas for Dillon County, on the 8th day of July, 1913, the defendant-appellant interposed, at the close of all the testimony, a motion for a direction of verdict, based upon the ground that section 2574 of Volume I of the Code of Laws of South Carolina, 1912, is unconstitutional, null and void, as applied to a shipment under a contract such as that proved in this case; for the reason that said Section is in contravention of Article I, Section 5 of the Constitution of South Carolina, and the 14th Amendment to the Constitution of the United States, in that the application thereof deprives defendant-appellant of the right to contract, and deprives it of property without due process of law, making it responsible for the debts and liabilities of another, without giving it adequate redress against such other; and in that Sections 2574 and 2575 of said Code of Laws of South Carolina are in contravention of Article I, Section 5 of the Constitution of South Carolina, and the 14th Amendment to the Constitution of the United States, in that said Sections deprive defendant-appellant of its property without due process of law, in that no provision is therein contained whereby defendant-appellant can obtain compensation for its loss of time in de-

fending suit against it or the expense of defending such suit and its attorneys' fees, and that this motion for a direction of a verdict was overruled by the Circuit Judge, by whom the jury were instructed that the Sections of the Code of Laws of South Carolina aforesaid, as applied to the shipment involved in this cause, were valid and binding; and that the provision of the contract relied upon by defendant-appellant was invalid as in contravention of such Sections of the Code of Laws of South Carolina.

69

III.

That from the ruling of the Circuit Court striking out the fifth defense interposed in the answer of defendant-appellant, and from the ruling of the Circuit Judge refusing to grant the motion of defendant-appellant for a direction of a verdict on the ground of the unconstitutionality of the Sections of the Code of Laws of South Carolina relied upon by plaintiff-respondent, the defendant-appellant appealed to the Supreme Court of the State of South Carolina, which by its final judgment, heretofore referred to, affirmed the holding of the Circuit Courts as to the validity of the Sections of the Code of Laws of South Carolina aforesaid, and made the judgment of the Circuit Court final.

IV.

That by the action of said Supreme Court of South Carolina in its final judgment aforesaid, affirming the judgment of the lower court sustaining the validity of the Sections of the Code of Laws of South Carolina aforesaid, and permitting a recovery from this defendant of the damages alleged in the complaint, regardless of the contract limiting the right of plaintiff-respondent to recover, to the line of railroad upon which such damage was sustained, your petitioner has been denied a title or right set up and claimed under the laws and Constitution of the United States, to-wit: The right to enter into a contract limiting the right of a shipper in case of loss of or damage to property transported over more than one line to recover from the line upon which such loss or damage occurred, whereby manifest error has happened, to the very great damage of your Petitioner, which has filed with this petition its assignments of error.

Wherefore, your Petitioner prays that a writ of error to the Supreme Court of the United States be allowed, that citation be
70 granted and signed, that the bond submitted be approved, and that upon compliance with the statutes in such case made and provided said bond and writ of error may operate as a supersedeas.

P. A. WILLCOX,
F. L. WILLCOX,
HENRY BUCK,
Defendant Petitioner's Attorneys.

Writ of error allowed and Supersedeas Bond fixed in the sum of $600.00.

EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

71 [Endorsed:] State of South Carolina, Fourth Circuit, Dillon County. In the Supreme Court. R. W. Glenn, Plaintiff-Respondent, vs. A. C. L. R. R. Company, Defendant-Appellant. Petition for Writ of Error. Law offices Willcox & Willcox, Florence, S. C. Filed Supreme Court S. C. Feb. 4, 1914. U. R. Brooks, Clerk.

72 Supreme Court of the United States, October Term, 1914.

In Error to the Supreme Court of South Carolina.

ATLANTIC COAST LINE RAILROAD COMPANY, Plaintiff in Error,
vs.
R. W. GLENN, Defendant in Error.

Assignments of Error.

Now comes the Atlantic Coast Line Railroad Company, Plaintiff in Error, and respectfully represents that it feels aggrieved by the proceedings and judgment of the Supreme Court of the State of South Carolina in the above entitled cause, and in connection with its petition for writ of error herein makes the following assignments of error, to-wit:

I.

That the said Supreme Court of South Carolina, in its final judgment rendered in said cause, erred in holding that the provisions in the contract of shipment to the effect that, in consideration of a reduced rate of freight, the liability of plaintiff in error, either as a common carrier or warehouseman, should be limited to such loss or damage as might occur on its own line or be caused by it, and to the effect that neither of the said carriers should be responsible or liable for any act, omission or negligence of the other carriers over whose lines said property should be transported, were not valid and binding,
73 because of the provisions of Sections 2574 and 2575 of the Code of Laws of the State of South Carolina, 1912; whereas it should have held that the said Sections of the Code of Laws of South Carolina are in contravention of the Fourteenth Amendment of the Constitution of the United States, when applied to such contract, and for the purposes of this case null and void, in that they have the effect of depriving plaintiff in error of the right to contract and of depriving it of its property without due process of law, and in that no adequate redress is therein provided whereby plaintiff in error may recover from the carrier on whose line the loss or damage occurred the amount paid on account thereof, the costs of defending this suit, the costs of a suit to recover such amount, and attorneys' fees.

II.

That the said Supreme Court of South Carolina, in its final judgment rendered in said cause, erred in holding that Circuit Judge Thomas S. Sease did not commit error in refusing the following re-

quests to charge, submitted upon the trial by plaintiff in error, to-wit:

"1st. If you find that there was no negligence on the part of defendant or that there was no delay on its line, your verdict must be for defendant.

"2nd. If you find that the cattle alleged to have been injured were not injured on defendant's line or by it, your verdict must be for defendant."

The Supreme Court of South Carolina should have held that Sections 2574 and 2575 of the Code of Laws of South Carolina, 1912, when applied to the contract of shipment and to the facts appearing to the Trial Court, were in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States, and in view of the unconstitutionality thereof should have al-
74 lowed the requests submitted, in that the said Sections have the effect of depriving plaintiff in error of the right of contract and of depriving it of its property without due process of law.

Wherefore, the said Atlantic Coast Line Railroad Company, Plaintiff in Error, prays that said judgment of the Supreme Court of the State of South Carolina be reversed, and that the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

P. A. WILLCOX,
F. L. WILLCOX,
HENRY BUCK,
Attorneys for Plaintiff in Error.

74½ [Endorsed:] Supreme Court of the United States, October Term. 1914. Atlantic Coast Line Railroad Company, Plaintiff in Error, vs. R. W. Glenn, Defendant in Error. Assignments of Error. Law offices Willcox & Willcox, Florence, S. C. Filed Supreme Court of S. C., Feb. 4, 1914. U. R. Brooks, Clerk.

75 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between R. W. Glenn, plaintiff, and Atlantic Coast Line Railroad Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State,

on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, Atlantic Coast Line Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this
76 writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 4 day of February, in the year of our Lord, one thousand nine hundred and fourteen.

[Seal United States District Court, Eastern District So. Ca.]

RICH'D W. HUTSON,
Clerk of the District Court of the United States for the Eastern District of South Carolina.

Allowed to operate as a Supersedeas:

EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

76½ [Endorsed:] United States of America, October Term, 1914. A. C. L. R. R. Company, Plaintiff-in-Error, vs. R. W. Glenn, Defendant-in-Error. Writ of Error. Law offices Willcox & Willcox, Florence, S. C. Filed Supreme Court S. C., Feb. 5, 1914. U. R. Brooks, Clerk.

77 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To R. W. Glenn, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of South Carolina, wherein Atlantic Coast Line Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judg-

ment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Eugene B. Gary, Chief Justice of the Supreme Court of the State of South Carolina, this 27th day of January, in the year of our Lord one thousand nine hundred and fourteen.

EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

STATE OF SOUTH CAROLINA,
County of Dillon:

I, S. V. Lane, Sheriff of Dillon County, State of South Carolina, do hereby certify that I have served the above Citation on the above named R. W. Glenn, by delivering to him, personally, and leaving with him a copy thereof, at Dillon, in the County of Dillon and State of South Carolina, on the 7th day of February, A. D., 1914.

S. V. LANE,
Sheriff of Dillon County, South Carolina.

78 [Endorsed:] State of South Carolina, in the Supreme Court. R. W. Glenn, Plaintiff-Respondent, vs. A. C. L. R. R. Company, Defendant-Appellant. Citation. Law offices Willcox & Willcox, Florence, S. C. Lodge 2/7/1914. S. V. Lane, Sheriff. W. B. 1/107#508. Filed Supreme Court of S. C. Feb. 14, 1914. U. R. Brooks, Clerk.

79 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, November Term, 1913, Fourth Circuit, Dillon County.

Judges Geo. W. Gage and Thomas S. Sease, presiding.

R. G. GLENN, Plaintiff-Respondent,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

I, Eugene B. Gary, Chief Justice of the State of South Carolina, hereby designate S. V. Lane, Sheriff of Dillon County, to serve the citation heretofore issued by me in the above stated case upon the issuing of the writ of error to the United States Supreme Court herein.

EUGENE B. GARY,
Chief Justice of the State of South Carolina.

80 [Endorsed:] State of South Carolina, in the Supreme Court, 4th Circuit, Dillon County. R. W. Glenn, Plaintiff-Respondent, vs. A. C. L. R. R. Co., Defendant-Appellant. Law offices Willcox & Willcox, Florence, S. C. Filed Supreme Court S. C. Feb. 4, 1914. U. R. Brooks, Clerk.

81 *Bond.*

Know all men by these presents That we, Atlantic Coast Line Railroad, as principal, and Fidelity & Deposit Company of Maryland, as sureties, are held and firmly bound unto R. W. Glenn in the full and just sum of Six Hundred and no/100 Dollars, to be paid to the said R. W. Glenn, his certain attorneys, executors, administrators, heirs or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 31st day of January, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a term of the Supreme Court of the State of South Carolina in a suit depending in said Court between R. W. Glenn and Atlantic Coast Line Railroad Company, a judgment was rendered against the said Atlantic Coast Line Railroad Company, and the said Atlantic Coast Line Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of said Court to reverse the judgment in the aforesaid suit, and a citation directed to R. W. Glenn, citing and admonishing him to be and appear at a term of the Supreme Court of the United States to be holden at Washington within thirty days from the date hereof.

Now, the condition of the above obligation is such, that if the said Atlantic Coast Line Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

82 ATLANTIC COAST LINE RAILROAD COMPANY,
By P. A. WILLCOX, *Attorney-in-Fact.*

Attest:
J. E. COTHRAN.
F. L. WILLCOX.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By HENRY E. DAVIS, *Attorney-in-Fact.*

Attest:
J. S. MITCHELL.
EULA MAY HINDS.

Attest:
JAMES W. HOWARD, *Agent.*

[Seal Supreme Court of South Carolina.]

Attest:

U. R. BROOKS, *Clerk.*

83 [Endorsed:] State of South Carolina. In the Supreme Court. R. W. Glenn, Plaintiff-Respondent, vs. A. C. L. R. R. Co., Defendant-Appellant. Bond. Law offices Willcox & Willcox, Florence, S. C. Copy. Filed Supreme Court of S. C., Feb. 4, 1914. U. R. Brooks, Clerk.

84 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

R. W. GLENN, Plaintiff-Respondent,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Return to Writ of Error.

I, U. R. Brooks, Clerk of the Supreme Court of South Carolina, by way of return to the writ of error directed to said Court by the Supreme Court of the United States in the above entitled cause, hereby transmit under my hand and seal a true copy of the record and of the assignment of errors, and of all proceedings in the case, together with true copies of all opinions filed in the case; and I certify that the record herewith transmitted is complete, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings necessary to the hearing of said case.

Witness my hand and the seal of the Supreme Court of South Carolina, this 5 day of March, A. D., 1914.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of the State of South Carolina.

Endorsed on cover: File No. 24,098. South Carolina Supreme Court. Term No. 393. Atlantic Coast Line Railroad Company, plaintiff in error, vs. R. W. Glenn. Filed March 13th, 1914. File No. 24,098.

FILED
NOV 13 1915
JAMES D. MAHER
CLERK

14

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 91.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

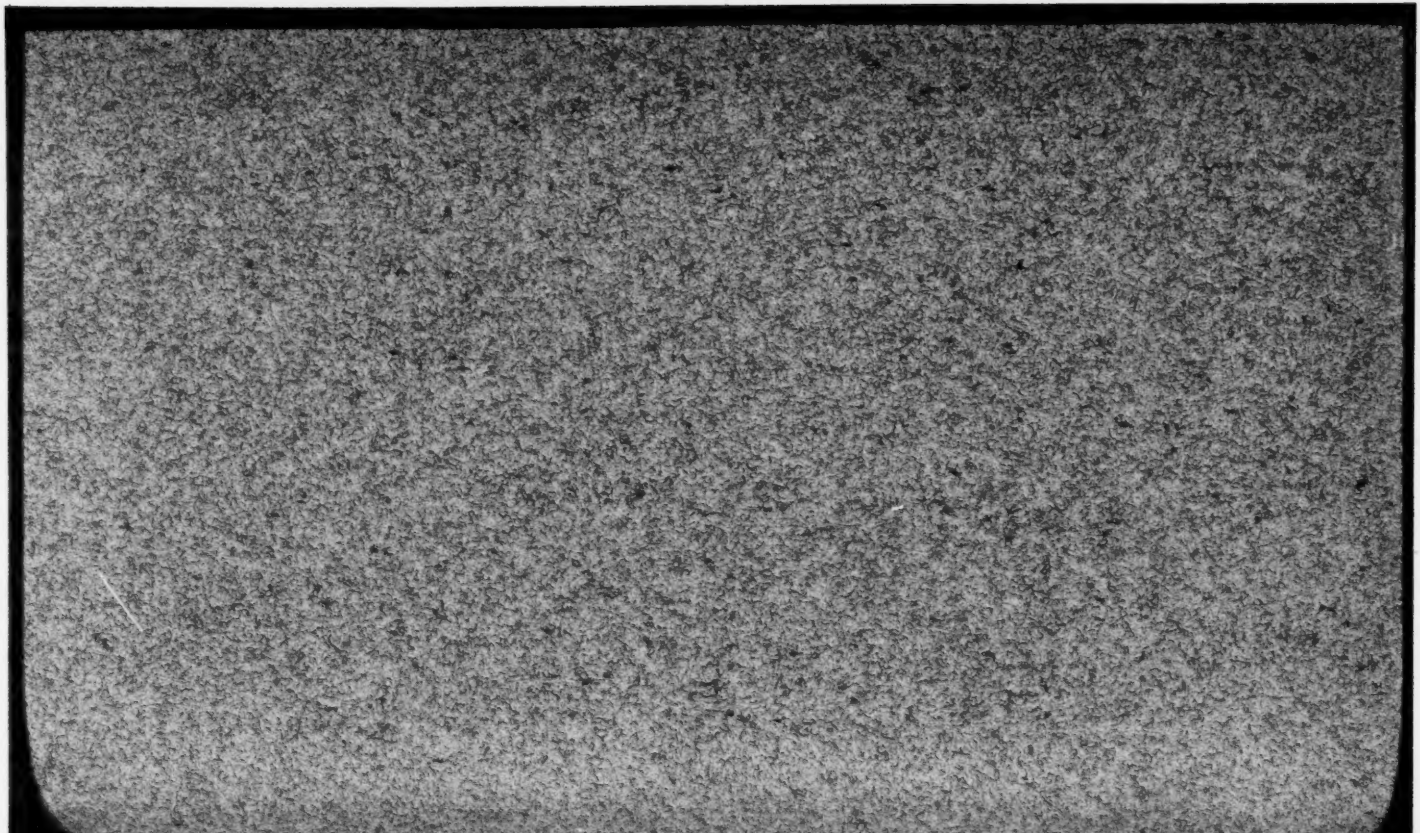
vs.

R. W. GLENN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

F. L. WILLCOX,
For Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 91.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

R. W. GLENN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This case arises on account of a claim made by the consignee against Atlantic Coast Line Railroad Company for alleged damages to live stock shipped from Chester, South Carolina, to Latta, South Carolina, on November 21, 1911. The stock were received by Southern Railway Company at Chester, S. C., for shipment over its line and the lines of the Atlantic Coast Line Railroad Company, under the terms of a

limited live-stock liability contract. By the terms of that contract the responsibility, either as common carrier or warehouseman, of each carrier over whose line the property shipped should be transported ceased as soon as delivery was made to the next carrier or to the consignee, and the liability of the lines contracted with was several and not joint, and neither of the carriers was to be responsible or liable for any act of omission or negligence of the other. The consideration for this agreement on the part of the shipper—who represented the consignee—was, as stated in the contract, a reduced freight rate.

The live stock moved over the lines of the Southern Railway from Chester, S. C., to Columbia, S. C., and thence over the lines of the Atlantic Coast Line to Latta, S. C.

The trial court refused, upon request of the attorney for the defendant, to instruct the jury, among other things, as follows:

> "(1) If you find that there was no negligence on the part of the defendant, or that there was no delay on its line, your verdict must be for the defendant."
>
> "(2) If you find that the cattle alleged to have been injured were not injured on the defendant's line, or by it, your verdict must be for the defendant."

A verdict having been rendered for plaintiff, and judgment entered, upon appeal to the Supreme Court for the State of South Carolina, exceptions alleging error in refusing the requests above mentioned were overruled, and the judgment of the trial court was affirmed, without comment upon these exceptions, other than such as was contained in a reference to the case of *Venning vs. Atlantic Coast Line*, 78 S. C., 42.

The case is brought to this court upon the following assignments of error:

> "I. That the said Supreme Court of South Carolina in its final judgment rendered in said cause, erred in holding that the provisions in the contract of ship-

ment to the effect that, in consideration of a reduced freight rate, the liability of plaintiff in error, either as a common carrier or warehouseman, should be limited to such loss or damage as might occur on its own line or be caused by it, and to the effect that neither of the said carriers should be responsible or liable for any act, omission or negligence of the other carriers over whose lines said property should be transported, were not valid and binding, because of the provisions of sections 2574 and 2575 of the Code of Laws of the State of South Carolina, 1912; whereas it should have held that the said sections of the Code of Laws of South Carolina are in contravention of the Fourteenth Amendment of the Constitution of the United States, when applied to such contract, and for the purposes of this case null and void, in that they have the effect of depriving plaintiff in error of the right to contract and of depriving it of its property without due process of law, and in that no adequate redress is therein provided whereby plaintiff in error may recover from the carrier on whose line the loss or damage occurred the amount paid on account thereof, the costs of defending this suit, the costs of a suit to recover such amount, and attorneys' fees.

"II. That the said Supreme Court of South Carolina, in its final judgment rendered in said cause, erred in holding that Circuit Judge Thomas S. Sease did not commit error in refusing the following requests to charge, submitted upon the trial by plaintiff in error, to wit:

" '1st. If you find that there was no negligence on the part of defendant or that there was no delay on its line, your verdict must be for defendant.'

" '2d. If you find that the cattle alleged to have been injured were not injured on defendant's line or by it, your verdict must be for defendant.'

"The Supreme Court of South Carolina should have held that sections 2574 and 2575 of the Code of Laws of South Carolina, 1912, when applied to the contract of shipment and to the facts appearing to the trial court, were in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States, and in view of the unconstitu-

tionality thereof should have allowed the requests submitted, in that the said sections have the effect of depriving plaintiff in error of the right of contract and of depriving it of its property without due process of law."

ARGUMENT, POINTS, AND AUTHORITIES.

The judgment of this court upon the constitutionality of the sections of the Civil Code of South Carolina attacked in the courts below will determine this case. The sections of that Code, under consideration here, are as follows:

> "SEC. 2574. All common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers, shall in this State, with the respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the courts of this State, any through bill of lading, way bill, receipts, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute *prima facie* evidence of the subsistence of the relations, duties, and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers or either of them.

"SEC. 2575. For any damages for injury, or damage to, or loss, or delay of any freight, baggage or other property sustained anywhere in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this State therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage or injury was sustained, together with costs of suit."

The meaning and effect of these Code provisions has been settled by the judgment of the Supreme Court of the State of South Carolina in the case of *Venning vs. R. R. Co.*, 78 S. C., 49, in which the following language is used:

"The act provides that all carriers which recognize, acquiesce in, or act upon a contract for through shipment shall be statutory connecting carriers, and, as such, agents of each other with respect to the matter of transportation, and they shall be under contract each with all the others, and with the shipper, owner, and consignee for safe and speedy transportation of the property from the point of shipment to destination. Any through bill of lading, issued by any one of such carriers, showing that any one of them received the property for through transportation, is made *prima facie* evidence of the agency of each other and all the others, and of the contract of each and all of such carriers with each other and with the owner to transport the property with safety and speed from the point of shipment to destination; and against this *prima facie* evidence of agency and contract the express stipulations of the parties themselves are made unavailing.

"In consonance with these provisions it is further enacted, the person sustaining damage or loss shall have the right of recovery against any one of the con-

necting carriers he may choose to sue; the liability being unaffected by proof that the property had been lost or damaged on another line, or had never come into the possession of the carrier sued. The carrier singled out by the shipper, owner, or consignee, is in turn allowed to recover from the carrier through whose negligence the loss, damage, or injury, was sustained, together with costs."

In the Venning case the South Carolina Supreme Court declared these Code provisions constituted an unreasonable burden upon interstate commerce, and were invalid in so far as interstate shipments are concerned. The State Supreme Court, however, declared such provisions to be valid and binding when invoked in connection with intrastate shipments, basing its conclusion upon the finding that under the Code of Laws of South Carolina, in force at the time, the second or terminal carrier was not required by law to recognize, acquiesce in, or act upon the through bill of lading issued by the initial carrier. That court holds that the connecting carrier may receive the goods, give its own receipt, charge its own freight, and in all respects repudiate or disregard the through bill of lading.

When the opinion in the Venning case was handed down by the State Supreme Court the following sections of the Civil Code of South Carolina were in full force and effect:

"SEC. 3192. No railroad doing business in this State shall be allowed to refuse to issue or recognize a through bill of lading between competitive points when issued over or by one railroad with which it connects unless it issues and recognizes the same where goods are shipped to or from said points over any other competitive railroad with which it connects reaching said point, and that the said railroad shall not charge nor receive for said goods passing over its lines, either by law of local freight, or a division of a through freight rate, a greater sum when said goods are shipped by or over one line of railroad with which it connects than it would charge or receive when said goods are shipped by or over any other line of rail-

road with which it connects: *Provided, however,* That nothing herein contained shall prevent any such railroad from demanding payment of its charges in advance of performing said service of carrying said goods, or from limiting its liability to losses or damage to said freight upon its own line by a clause inserted in said bill of lading.

"SEC. 3193. Every railroad company doing business in this State working railways which form a part of a continuous line of railway communication shall afford all due and reasonable facilities for receiving and forwarding by one of such railways all the traffic, freight or passengers arriving by the other, without any unreasonable delay and without any preference or advantage or prejudice or disadvantage, and so that no obstruction may be offered to the public desirous of using such railways as continuous line of communication, and so that all reasonable accommodation may, by means of the railways of the several companies, be at all times afforded to the public in that behalf.

"The above-mentioned facilities and benefits shall be afforded as well to other railroads as to the public.

"SEC. 3194. All persons shipping from, into, within or through this State shall have the right to designate the route or routes by which said goods shall be shipped, and it shall be unlawful for any corporation or person other than the holder of the bill of lading to vary said routing so designated, or to ship the same by any other route, or to receive said goods if so diverted, unless the route so designated shall be interrupted or incapable of being used at the time by strike or casualty, preventing the running of trains thereof.

"SEC. 3195. Any transportation company violating the provisions of any of the sections 3191, 3192, 3193, and 3194, willfully or knowingly shall be subject to a suit for each violation thereof at the instance of any person or owner of goods, or other persons or corporations, and upon proof of such violation the said party instituting the same shall be entitled to recover a penalty of five hundred dollars for such violation. Each violation of said sections shall constitute a separate cause of action.

> "SEC. 3277. Every railroad corporation shall forward promptly merchandise consigned or directed to be sent over another road connecting with its road, according to the directions contained thereon or accompanying the same, and shall not receive and forward over its road any merchandise consigned, ordered or expressly directed to be received and forwarded by a different route."

At the same time the following provision of the Criminal Code of the State was in effect:

> "SEC. 669. Any person who shall willfully violate or aid in violating, or direct or order any one to violate sections 3191 to 3194 of the Civil Code, as to the transportation of through freight, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment not less than 3 months nor more than 12 months, or both, in the discretion of the court."

These sections all tend to show that the purpose of the General Assembly in enacting this branch of the railroad law was to facilitate through shipments, in the interest of the patrons of the railroad carriers of the State, and even if the sections just quoted can be held, under the construction given in the *Venning* case, not to require absolutely the intermediate or connecting carrier to accept from the initial carrier a shipment of freight under the terms and conditions specified in the bill of lading issued by the initial carrier, yet it clearly appears that the very purpose for which these various sections were enacted would be defeated if the railroad companies should adopt the practice suggested in the *Venning* case, for avoiding the penalty imposed upon an intermediate or terminal carrier for taking from the initial carrier a shipment under the initial bill of lading, when that shipment had already been damaged. If each carrier has the privilege of declining to accept a shipment tendered by a connecting carrier, until a new bill of lading shall have been issued, it

will readily be seen that none of the beneficial results of through transportation can be enjoyed. If it be admitted that this right to decline to accept freight from an initial carrier under the original bill of lading existed, then all excuse for enacting the law in question, from standpoints of public convenience and necessity, at once disappear, because the exercise of that right by the various intrastate carriers would at once destroy all through routes and rates, and no beneficial purpose would be subserved by the act.

Viewed in its relation to public policy and public convenience, this case may be distinguished in another particular from the case of *Atlantic Coast Line Railroad Company against Riverside Mills,* in which the constitutionality of the Carmack amendment was declared in this court. In interstate transportation the carrier responsible for the damage may be in a distant State. In intrastate transportation each of the carriers is subject to the jurisdiction of the courts of the shipper's residence, and at no great distance therefrom. The consideration of public convenience, invoked in support of the Carmack amendment, making the initial carrier responsible for delivery at destination in the interest of unity of transportation, with unity of responsibility, cannot be invoked in support of an act making any one of the several carriers responsible, the one to be held responsible to be selected by the shipper, not in accordance with any fixed principle, but merely to satisfy the convenience or whim of such shipper. Such a power placed in the hands of the shippers of a particular State, so far from subserving a beneficial purpose, might be used to practically destroy a small carrier operating largely in connection with a more powerful connecting carrier.

Such stipulations as these, against which this legislation was directed, have at all times been recognized, previous to the legislation, as lawful and reasonable limitations. Previous to this legislation the initial carrier could not make a contract binding upon the terminal carrier.

Venning vs. R. R. Co., supra.

Previous to this legislation the liability of a common carrier terminated with its prompt delivery of the property in good order to the next connecting carrier, and likewise, it would seem, the liability of a connecting carrier terminated upon its prompt delivery of the property to the next connecting carrier, or to the consignee, in the same condition in which the property was received by it.

St. Louis Ins. Co. vs. R. R. Co., 104 U. S., 146; 26th L. Ed., 679.

Now, under this legislation, as construed by the State Supreme Court, the highest degree of care in the handling of property shipped under a through bill of lading, and received by the terminal or connecting carrier from the carrier with which the contract was made, does not relieve the terminal carrier of liability. For a default or delict (not of its own agents or servants, but of those of the initial carrier), for which it was in no sense responsible, and which it had no means and no opportunity of preventing, the terminal carrier is made liable, and no consideration is provided in the statute to be paid it for assuming this burden. The terminal carrier, without being heard, without an opportunity to be heard, and without compensation, other than that to which it would be entitled in the absence of the necessity for paying a loss or damage claim, is charged with a burden, to wit, that of assuming liability for acts which it had no means of preventing. To use the language of the learned justice who rendered the opinion in the Venning case: "The General Assembly has in effect forbidden a common carrier to recognize, acquiesce in, or act upon a through contract of shipment made by a shipper, owner or consignee with another carrier, except upon condition that it shall become liable for any default of such other carrier," not only such defaults as may thereafter happen in the handling of the shipment by agencies selected by the connecting carrier, but also for those which have already happened in the handling of the shipment by carriers in the selection of which the

party sued had no choice. For carrying goods the connecting carrier receives its proportion of the freight paid. For assuming and having imposed upon it liability for loss or damage already incurred it receives nothing.

It may be conceded that the State has ample power to regulate the business of public transportation within its borders, but under the guise of regulation we respectfully submit that it has no right to force a common carrier to assume liability for the defaults of another as a prerequisite to the right to engage in a particular branch of its business in the usual way.

A citizen of the State of South Carolina has an inherent right to enter into a contract with a common carrier for the transportation of property over its own and connecting lines. He has an inherent right to make a contract for a fair consideration, passing to him, relieving the common carrier—whether initial or otherwise—from liability for the default of another, which has already occurred. This act, as enforced by the State Supreme Court, deprives a citizen of that right. It likewise deprives the common carrier of the reciprocal right to carry goods at a lower rate than would otherwise be applicable upon condition that it should not be liable for the default of another—possibly insolvent—common carrier.

Allgeyer vs. State of Louisiana, 165 U. S., 578.
Williams vs. Fears, 179 U. S., 270.

P. A. WILLCOX,
F. L. WILLCOX,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 393.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

R. W. GLENN, DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFF IN ERROR.

Statement of Case.

This was a shipment of cattle from Chester, South Carolina, to Latta, South Carolina, under what is known as a "limited liability live stock contract," under the terms of which no carrier should be liable for damage done upon the line of a connecting carrier, and was based upon a valuable consideration, to wit, a reduction in freight rate. In its answer plaintiff in error set this provision of the contract up as a fifth defense. Whereupon defendant in error moved the court for an order to strike out this defense, which was granted. In its appeal, after final judgment, according to

proper practice, plaintiff in error excepted to the ruling of the court in striking out this defense, as will be seen by reference to the exceptions found in the appendix hereto.

Upon a trial of the cause upon its merits, plaintiff in error submitted two requests to charge, as follows, which were refused:

> "I. If you find that there was no negligence on the part of defendant, or that there was no delay on its line, your verdict must be for defendant.
>
> "II. If you find that the cattle alleged to have been injured were not injured on defendant's line or by it, your verdict must be for defendant."

Under the terms of section 3192, of volume I of the Code of Laws of South Carolina, 1912, railroads are required to recognize through bills of lading, the last clause of which is contradictory to sections 2574 and 2575, as found in appendix to the motion of defendant in error. See said section in appendix hereto.

ARGUMENT.

The testimony conclusively showed that the delay and damage to the shipment involved was caused by the Southern Railway, before delivery to plaintiff in error. It would seem proper to discuss the state of the law prior to the enactment of sections 2574 and 2575. The Supreme Court of the United States, in Mich. Central R. R. Co. *vs.* Mineral S. M. Co., 83 U. S., 18, held that, in the absence of a contract to the contrary, the liability of a common carrier ended with its prompt delivery of the shipment in good order to its connecting carrier. The law was held to be the same in this State in a number of cases, the last of which was Hill *vs.* Railroad Co., 43 South Carolina, 461. In Harby *vs.* Southern Railway, 75 South Carolina, 321, terminal and intermediate carriers were held entitled to the benefit of reasonable stipulations in the bill of lading limiting liability.

By the enactment of said sections, the General Assembly has completely changed the legal relations of connecting carriers to each other and to the owners of goods. Venning *vs.* R. R. Co., 78 South Carolina, 42. Under the terms of said sections, connecting carriers are made the agents of each other, and under section 3192 heretofore referred to, they must acquiesce in a through bill of lading. It seems to us that this case is clearly distinguishable from the case of Atlantic Coast Line Railroad Co. *vs.* Riverside Mills, 219 U. S., 202, in that, under the Carmack Amendment, a carrier, when it posts its schedules of rates to points beyond its line and accepts a shipment to some such point, does so in contemplation of the law, and it has the right to select its agent, the connecting carrier, whereas, under the statute attacked in this case, as construed in connection with section 3192, a terminal or intermediate carrier must accept a shipment, even in a damaged condition, and thereby assume a liability against which it could not have provided, as in this case. The case of Atlantic Coast Line *vs.* Riverside Mills, *supra,* suggests the differences and discusses the methods in vogue which embrace a voluntary arrangement of through routes and rates. In this case, this court expressly refrained from considering the question here presented. To quote:

> "But it is said that any security resulting from a voluntary agreement constituting a through route and rate is destroyed if the receiving carrier is not at liberty to select his own agencies for a continuance of the transportation beyond his own line. This is an objection which has no application to the present case. This action was for loss and damage arising from several distinct shipments to different places beyond the line of the plaintiff in error, who was the initial or receiving carrier. The presumption, from the absence of anything to the contrary in the record, is that the routing was over connecting lines with whom the plaintiff in error had theretofore made its own arrangements and rate. This record presents no question as to the right of the initial

carrier to refuse a shipment designated for a point beyond its own line, nor its right to refuse to make a through route or joint rate when such route and rate would involve the continuance of a transportation over independent lines. *We therefore refrain from any consideration of the large question thus suggested.* The shipments involved in the present case were voluntarily received by an initial carrier who undertook to escape carrier's liability beyond its own line by a provision limiting liability to loss upon its own line. This was forbidden by the Carmack amendment, and any stipulation and condition in the special receipt which contravenes the rule in question is invalid."

Another factor suggested by the facts in this case is that there was a contract between the parties in writing, based upon a valuable consideration, to wit, a reduction in freight rate, that no carrier should be responsible for damage except on its own line. Contracts of this kind, signed by the parties and based upon a valuable consideration, have always been upheld by this court, even when in conflict with a State statute. Hart *vs.* Penn. Railroad, 112 U. S., 331; Adams Express Co. *vs.* Croninger, 226 U. S., 491; Chicago, etc., R. R. *vs.* Miller, 226 U. S., 513; Chicago, etc., R. R. *vs.* Latta, 226 U. S., 328.

And plaintiff in error respectfully submits that a question so vital should not be summarily dismissed, but should be argued in full and carefully considered by the court.

Respectfully submitted,

P. A. WILLCOX,
F. L. WILLCOX,
HENRY BUCK,
Attorneys for Plaintiff in Error.

APPENDIX.

Exceptions Before the Supreme Court of South Carolina.

I. Because his honor, Judge Gage, erred, it is respectfully submitted, in refusing to hold that section 2574 does not apply to the contract of shipment in this case, which was based upon a valuable consideration, to wit, a reduction in freight rate.

II. Because his honor, Judge Gage, erred, it is respectfully submitted, in granting plaintiff's motion and in refusing to hold section 2574 unconstitutional and void, in that said section as applied to this action is in contravention of article I, section 5 of the Constitution of South Carolina, and the Fourteenth Amendment to the Constitution of the United States, in that said section deprives defendant of the right of contract and deprives it of property without due process of law, making it responsible for the debts and liabilities of another without giving it adequate redress against such other.

III. Because his honor, Judge Gage, erred, it is respectfully submitted, in refusing to hold that section 2574, construed with section 2575, is in contravention of said sections of the Constitution of South Carolina, and the Constitution of the United States, in that said section, while purporting to make the carrier really at fault responsible to defendant, yet they together deprive defendant of its property without due process of law, in that no provision is therein contained whereby defendant can obtain compensation for its loss of time in defending suit against it, or the expense of defending such suit, and its attorney's fees.

IV. Because his honor, Judge Sease, erred, it is respectfully submitted, in not granting defendant's motion for a direction of verdict on the first four grounds stated therein, it being respectfully submitted that section 2574 of volume I of the Code of South Carolina of 1912 is unconstitutional, null and void as applied to a shipment under a contract such as that proved in this case, for the reasons set forth in the first three exceptions herein above, and in that the testimony conclusively shows, and no other inference can be drawn from it, that there was no delay with the defendant and no rough handling or damage done by defendant.

V. That his honor, Judge Sease, erred, it is respectfully submitted, in not holding the said section of the Code unconstitutional for the reasons hereinbefore stated in these exceptions, and that only one inference can be drawn from the testimony, to wit, that there was no delay in the transportation of, or damage done to, the carload of cattle by the defendant, and erred, it is respectfully submitted, in not holding this a complete defense to plaintiff's cause of action.

VI. Because his honor, Judge Sease, erred, it is respectfully submitted, in not holding that even if the said section of the Code is constitutional, that the allegations of the complaint in this case, the plaintiff having seen fit to allege in paragraph nine of his second cause of action: "That said contract for shipment was over the lines of two or more common carriers, the defendant being one of them and terminal carrier; that said contract provided in effect that the responsibility of each of said carriers should cease upon delivery to its connecting line of said cattle in good order: that the defendant received said cattle under the terms of said contract," conclusively bind plaintiff to the validity of said contract, and the testimony conclusively showing as it does in this case, and it being possible to draw only one inference from it, that there was no delay or damage to the

shipment by defendant, the defendant was entitled to a direction of verdict, upon and under the allegation of said paragraph 9 of the second cause of action stated in the complaint, and as stated in defendant's fifth ground for motion to direct verdict.

VII. Because his honor, Judge Sease, erred, it is respectfully submitted, in refusing defendant's requests to charge, in that the contract of shipment in this case was based upon a valuable consideration, to wit, a reduction in freight and contained the provision, "That neither of the carriers over whose lines said live stock should be transported should be responsible or liable for any action, omission or negligence of any other carrier over whose lines said live stock might be transported;" that said section of the Code does not apply to contracts of this nature, signed by both consignor and defendant, and even if it does, it is unconstitutional, null and void, and even if constitutional, plaintiff having alleged it as a valid contract is bound by his allegations and could not recover.

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§ 3192 Civil Code of South Carolina, 1912.

Railroad must recognize through bill of lading—when.—No railroad doing business in this State shall be allowed to refuse to issue or recognize a through bill of lading between competitive points when issued over or by one railroad with which it connects unless it issues and recognizes the same where goods are shipped to or from said points over any other competitive railroad with which it connects reaching said point, and that the said railroad shall not charge nor receive for said goods passing over its lines, either by law of local freight, or a division of a through freight rate, a greater sum when said goods are shipped by or over one line of railroad with which it connects than it

would charge or receive when said goods are shipped by or over any other line of railroad with which it connects: *Provided, however,* That nothing herein contained shall prevent any such railroad from demanding payment of its charges in advance of performing said service of carrying said goods, or from limiting its liability to losses or damage to said freight upon its own line by a clause inserted in said bill of lading.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 393.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

R. W. GLENN, DEFENDANT IN ERROR.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM OR TO TRANSFER TO THE SUMMARY DOCKET.

Comes now R. W. Glenn, the defendant in error, by his attorneys of record herein, and upon the record in this cause moves this honorable court:

First. To dismiss the writ of error herein, on the ground that this court has not jurisdiction thereof, no Federal question being involved herein.

Second. To affirm the judgment and decision of the Supreme Court of South Carolina, on the ground that it is manifest that this writ of error was taken for delay only and that the questions on which the decision of this cause depends are so frivolous as not to need further argument.

Third. To transfer this cause for hearing to the summary docket if this court should refuse to dismiss or affirm, because the case is of such a character as not to justify extended argument.

Fourth. To award the defendant in error damages in the sum of 10 per cent of the judgment, under rule number 23 of the rules of this court, because it is manifest and clearly appears that the writ of error in this cause has been taken merely for delay.

JOE P. LANE,
L. B. HASELDEN,
Dillon, S. C.,
Attorneys for Defendant in Error.

FREDERICK S. TYLER,
Washington, D. C.,
Of Counsel for Defendant in Error.

NOTICE OF MOTION.

To P. A. Wilcox, F. L. Wilcox, and Henry Buck:

You are hereby notified that the defendant in error in the above-entitled cause will, on Monday, the 14th day of December, 1914, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, upon the record and papers in this cause, submit for the consideration of the said court the foregoing motions, and each of them, and the brief in support thereof hereunto attached, including portions of the record in said cause contained in an appendix thereto, all of which are now served upon you herewith.

JOE P. LANE,
L. B. HASELDEN,
Dillon, S. C.,
Attorneys for Defendant in Error.

FREDERICK S. TYLER,
Washington, D. C.,
Of Counsel for Defendant in Error.

Statement of Case.

Notice of the above motion has been served upon the plaintiff in error herein, together with a copy of the motion and the brief in support of same. The defendant in error has also printed and filed herewith in the appendix to this brief such portion of the record herein as is deemed necessary for the consideration of the motion.

This writ of error is sued out by the plaintiff in error to reverse a judgment of the Supreme Court of South Carolina affirming a judgment of the Court of Common Pleas in and for Dillon County, South Carolina.

The sole question here presented is concerning the constitutionality of sections 2574 and 2575 of the Civil Code of 1912, vol. 1, of South Carolina, in relation to the liability of common carriers to consignees, owners, and shippers as to intrastate shipments. *No question of interstate shipments is involved in this action.* Said sections of the code will be found printed in full in the appendix, at page 13.

The original action was an action brought by the defendant in error, R. W. Glenn, against the plaintiff in error for damages to cattle shipped from Chester, in the State of South Carolina, to Latta, in the State of South Carolina, said damages having arisen on account of delay in the shipment of said cattle. The cattle were delivered to the Southern Railway Company at Chester and were by said company delivered to the defendant at Columbia, South Carolina, for transportation to Latta. The defendant in error simply went into court and set up his proof of the damaged condition of the cattle on delivery to him at Latta by plaintiff in error, and the jury awarded him a verdict for three hundred dollars.

The plaintiff in error claims that the shipment was under what is generally termed a "limited liability contract," which bound the defendant in error to sue the party really at fault in bringing about the damage, and attempted to prove that

it was not responsible for the damage, it not having occurred on its line, and that the aforementioned sections of the code of laws of South Carolina, which seek to make whichever connecting common carrier over whose lines a shipment moves liable to the owner or shipper or consignee, which such owner or consignee first elects to hold responsible, regardless of where the damage occurred, provided only one action may be brought for one loss, and that whatever common carrier is sued shall have his remedy against the one at fault, unconstitutional and void, in that it deprives plaintiff in error of its right to contract and deprives it of its property without due process of law, and in that no adequate redress is therein provided whereby plaintiff in error may recover from the carrier on whose line the loss or damage occurred, the amount paid on account thereof, the costs of defending this suit, and attorneys' fees.

The plaintiff in error submitted a motion for a nonsuit and for a directed verdict in the Court of Common Pleas at Dillon, South Carolina, which was promptly overruled, and then submitted requests to charge covering the same points, and same were refused. He then appealed to the Supreme Court of South Carolina, where the judgment of the Court of Common Pleas was affirmed, and now sues out this writ and sets out the assignments of error covering practically the same exceptions as presented to the said courts in South Carolina, except as hereinafter shown. Such excerpts from the opinion of the Supreme Court of South Carolina and from the material parts of the records will be found in the appendix as we think necessary for a proper understanding of the case.

Argument on Motion to Dismiss and Tax Penalty for Frivolous Appeal.

In the first place, the defendant in error takes the position that there is no Federal question in this case, although the plaintiff in error tries to make it appear by its assignments of error that there is such a question. In this particular action the defendant in error brought this action against the terminal carrier for his loss and damage and in the absence of any proof whatever of who was the actual party at fault. The presumption of law is that the loss and damage occurred on the terminal line, and it was a question for the jury whether or not the presumption of law was greater than the actual proof introduced by the plaintiff in error to rebut such presumption, and the presiding judge so charged the jury and the Supreme Court of South Carolina so held. (See page 17, Appendix.) And therefore the charges requested by the plaintiff in error on the trial as set forth in the second assignment of error should have been refused, and for the same reason the constitutionality of the act could not be the determining feature of this case, as the jury could have arrived at the verdict on this principle of the common law, regardless of the statute. The rule of this court is that if a judgment of a State court may be upheld on any ground the court will adopt the ground on which it be upheld, regardless of all grounds upon which it may not be upheld, and if the error complained of is not a controlling feature of the case a Federal question cannot be involved.

There is another reason why no Federal question is presented to the court in this case, which is that although on the face of the assignments of error it would appear there is, nevertheless on close examination of the case it will be seen that it does not bear them out. For instance, in the first assignment of error it is stated that the said sections of the code do not provide an adequate remedy for a carrier to recover from the carrier really at fault the amount the

carrier so held liable by such shipper, consignee, etc., pays out for any damage or loss to any shipment and costs of suit, when as a matter of fact the two sections of the code taken together do so provide, as will be seen by examination of same. (See Appendix, page 14.) Plaintiff in error, however, goes further and assigns error in that it does not provide for the recovery of the costs of bringing another suit to recover same and attorneys' fees, but the Supreme Court of South Carolina holds in said case that there are no attorney fees that can be recovered in law in South Carolina except under contract for same, and that the only inadequacy complained of by the plaintiff in error is its loss of time in defending such suit and attorneys' fees, so by excerpt from the exceptions of the plaintiff in error, printed in the appendix, page 17, the court will see that *plaintiff in error is seeking to present additional grounds for assignment of error which were not passed upon by the original court when he attempts to assign error in that the section of the code does not provide for it to recover its expenses in bringing the second suit to recover for what it pays out in the original action, as this was not excepted to in South Carolina courts.* It has been held by all courts that it is against public policy to allow damages or losses sustained in courts and expenses for loss of time or attorneys' fees to be recovered from parties to actions except on bonds for that purpose given, especially so in South Carolina, or in such actions as malicious prosecutions, as it would tend to frighten deserving litigants from the courts. Then, further, there is nothing in the record of this case to show that there has been any attorneys' fees paid, or any loss of time or expenses incurred, and this question could only be raised when something of this nature had been involved in the case. In fact, there is nothing in the case to show that the connecting carrier, Southern Railway Company, will refuse to pay the plaintiff in error for all such losses as it has sustained. In fact, the entire matter is such a fine-spun, vague, and indefinite technical objection to the constitutionality of

the act that it seems to us that it should be adjudged frivolous on its very face and merely intended for delay.

As heretofore set out, this was a matter of an intrastate shipment, and we deem it at this point absolutely unnecessary to cite the court any authorities or render any argument as to the right of the State to pass an act that impairs the right of contract, as it has been too often held by this court and all other courts of the United States that such State within its borders has an absolute right to pass any act which it deems necessary for the public good, or even for the public convenience of its citizens, and that such acts do not present any Federal question under the Fourteenth Amendment to the Constitution. See—

Crowley *vs.* Christianson, 137 U. S., 86.
Noble State Bank *vs.* Haskell, 219 U. S., 104.

And for these reasons we think the motion to dismiss should be granted and the costs and penalties as provided by the rules for appeals, which are merely intended for delay, be ordered taxed up against the plaintiff in error.

Argument on Motion to Affirm or Transfer to Summary Docket.

If it should, however, be decided by the court that a Federal question is presented, on the very face of the assignments of error it seems to us that such question is not founded on any real merit, as the case will show on examination, and is in nowise a real question, since it has been too often held by the courts "that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals or the public safety," as it is well expressed in the case of C., B. & Q. R. Co. *vs.* Ill., 200 U. S., 341, and held in "Crowley *vs.* Christianson, 137 U. S., 86.

It was held in Noble State Bank *vs.* Hasken, 219 U. S., 104:

> "It may be said in a general way that the police power extends to all great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong or preponderant opinion to be greatly and immediately necessary to the public welfare."

As to the power of the legislature of a State to pass an act which restricts the right to contract, when public policy demands it, or when the same is for the best interest of the public, there is now no question in this court, for, as is well said by this court in the case of Atlantic C. L. R. Co. *vs.* Riverside Mills, 219 U. S., 202-205; 55 L. ed., 181:

> "It is obvious from the many decisions of this court that there is no such thing as absolute freedom of contract; contracts which contravene public policy cannot be lawfully made at all and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests."

This was rendered in the case passing on the Carmack amendment, which bears the same relation to interstate commerce in the United States as sections 2574 and 2575 of the Code of South Carolina bear to intrastate commerce in South Carolina. They are practically the same in spirit, the only difference being that the Carmack amendment is a congressional act and applicable to interstate commerce and the other is an act of the legislature of South Carolina and applicable to intrastate commerce in South Carolina, and the Carmack amendment provides that the initial carrier is always liable for whatever damages occur to shipments, while the South Carolina statute makes any one of the carriers

liable, whichever one the damaged party elects to first sue or hold responsible.

And as to depriving the plaintiff, appellant, of his property without due process of law, if the court should decide such a question can possibly be raised in this case, after reading the assignments of error and the said sections of the South Carolina Code as they appear in the appendix and at page 13, then we will cite the court to the case of Atlantic C. L. R. Co. *vs.* Riverside Mills, *supra*, the court quoting from Grundling *vs.* Chicago, 177 U. S., 183; 44 L. ed., 725:

> "Unless the regulations are utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily and in a manner wholly arbitrarily interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass and they form no subject for Federal interference. As stated in
>
> "Crowley *vs.* Chisenden, 137 U. S., 86; 34 L. ed., 620,
>
> the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the country."
>
> "It seems to us therefore that the test whether due process of law has been violated is that of reasonableness as distinguished from arbitrary action, but this must not be understood to authorize the court to substitute its judgment for that of the legislature as to the necessity or propriety of legislation, or as has been said by this court 'Judges should be slow to read into the latter a *nolumus mutare* as against a law-making power.'"
>
> Bank *vs.* Haskell, 219 U. S., 104.

Mr. Justice Matthews, on page 582 of Hurtado *vs.* California, 110 U. S., 530, says:

> "That process of law which is not otherwise forbidden must be taken as due process of law, if it can show the sanction of settled usage both in England and in this country, but it by no means follows that nothing else can be due process of law. But to hold such a characteristic as essential would be to deny every quality of law but its age, and to render it incapable of progress or improvement. It would be to stamp on our jurisprudence the unchangeableness attributed to the law of the Medes and Persians. Where the public interest or the safety and welfare of the State require the curtailment of the liberty of contract, the latter may be restrained."
>
> Patterson *vs.* Eudora, 190 U. S., 169.
> Frisbie *vs.* U. S., 157 U. S., 160.

This contention of plaintiff in error seems furthermore unreasonable and without any foundation to us, and we may say absurd, for the reason that it certainly could not be assumed by the legislature that any of the carriers would ever be sued under this act unless the claim were a just one and unless the shipment had really been damaged by some road in transit; and, if a damage is sustained, some road is liable, and these roads, on account of their unity of business, direct connection, and facilities for accounting with each other, can readily and easily place the carrier at fault and ascertain the damage, if any, and they are not hindered by the statute from paying same without a suit and settling with the carrier at fault or holding same liable in an action. It would certainly be impossible for the legislature to have made a provision where any and all of these carriers should be protected from unjust suits. In fact, no citizen is protected by law from having to bear the expense of suit and attorneys' fees, no matter how worthless or unjust the suit against him is, except in case it be malicious. In support of this contention we will quote again from Atlantic C. L. R. Co. *vs.* Riverside Mills, *supra,* 55 L. ed., at page 181:

> "The requirement that carriers who undertook to engage in interstate transportation and as a part of that business held themselves out as receiving pack-

ages destined to places beyond their own terminal should be required as a condition precedent of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulations. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the court may judicially know, embrace not only the voluntary arrangement of through route and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt settlement of traffic balances. The routing in a manner depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper cannot have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier's liability which should fall upon one of the connecting carriers as between themselves."

If this is true of the Carmack amendment in regard to interstate commerce why should not the same be true of section 2574, in regard to intrastate shipment? It is true that the Carmack amendment makes the receiving carrier liable, but the rate is collected as often, and more often, at the terminal point than at the receiving point, and the terminal or intermediate carrier has the same facilities for adjusting the loss or damage and fixing the responsibility as does the receiving carrier. These contracts of shipment and methods of through transportation are, as this court may judicially know, mutually arranged between the carriers, and it is an easy matter for any of them to locate the responsibility for and adjust amongst themselves any and all dam-

age or loss that may occur to any shipment during the transit. This statute is not only made by the legislature in the best interest of the public in general, but under the existing conditions of the present methods of commerce is absolutely necessary for the protection of shippers, owners and consignees. For instance, must a consignee whose shipment has been damaged in transit be forced after he has paid the shipper for the same and all freight charges and received the shipment, to go possibly two or three hundred miles in order to bring suit, to say nothing of the expense he may or might have in trying to locate, before he brings the suit, the carrier actually at fault in the damage? Then, too, must he suffer the expense of bringing possibly two or three suits before he can discover the real party at fault? Without such a law would it be possible for him to ever recover anything for his damages? If we will think for a moment of the probability of connivance and withholding of information by the carriers, it will be easy to see that in a number of cases no shipper or consignee or owner could ever recover for any damage. In fact, this is just the condition which gave occasion for the passage of section 2574 by the legislature of South Carolina.

For these reasons we respectfully submit to the court that there is nothing in this case that should be given any more of the court's time in considering the same.

And we submit that the motion to dismiss should be granted or that the judgment should be affirmed, or, if failing in these motions, that the case be placed on the summary docket.

Respectfully submitted,

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APPENDIX.

Copy of Sections 2574 and 2575 of Code of Laws of South Carolina, Vol. 1, for 1912.

(2574)

CONNECTING LINES OF COMMON CARRIERS DEFINED AND THEIR LIABILITY FIXED.—All common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers, shall in this State, with the respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the courts of this State, any through bill of lading, way bill, receipt, check or other instrument issued by either of such carriers or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute *prima facie* evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them. (2575)

For any damages for injury, or damage to, or loss, or delay of any freight, baggage or other property sustained anywhere in such through transportation over connecting lines or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this State therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action

to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage or injury was sustained, together with costs of suit.

Assignments of Error.

Now comes the Atlantic Coast Railroad Company, plaintiff in error, and respectfully represents that it feels aggrieved by the proceedings and judgment of the Supreme Court of the State of South Carolina in the above-entitled cause, and in connection with its petition for writ of error herein makes the following assignments of error, to wit:

I.

That the said Supreme Court of South Carolina, in its final judgment rendered in said cause, erred in holding that the provisions in the contract of shipment to the effect that, in consideration of a reduced rate of freight, the liability of plaintiff in error, either as a common carrier or warehouseman, should be limited to such loss or damage as might occur on its own line or be caused by it, and to the effect that neither of the said carriers should be responsible or liable for any act, omission or negligence of the other carriers over whose lines said property should be transported, were not valid and binding, because of the provisions of sections 2574 and 2575 of the Code of Laws of the State of South Carolina, 1912; whereas it should have held that the said sections of the Code of Laws of South Carolina are in contravention of the Fourteenth Amendment of the Constitution of the United States, when applied to such contract, and for the purposes of this case null and void, in that they have the effect of depriving plaintiff in error of the right to contract and of depriving it of its property without due process of law, and in that no adequate redress is therein provided whereby plaintiff in error may recover from the carrier on whose line the loss or damage occurred the amount paid on account thereof, the costs of defending this suit, the cost of a suit to recover such amount, and attorney's fees.

II.

That the said Supreme Court of South Carolina in its final judgment rendered in said cause erred in holding that Circuit Judge Thomas S. Sease did not commit error in refusing the following requests to charge, submitted upon the trial by plaintiff in error, to wit:

"1st. If you find that there was no negligence on the part of defendant or that there was no delay on its line your verdict must be for the defendant.

"2d. If you find that the cattle alleged to have been injured were not injured on defendant's line or by it, your verdict must be for defendant."

The Supreme Court of South Carolina should have held that sections 2574 and 2575 of the Code of Laws of South Carolina, 1912, when applied to the contract of shipment and to the facts appearing to the trial court, were in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States, and in view of the unconstitutionality thereof should have allowed the requests submitted, in that the said sections have the effect of depriving plaintiff in error of the right of contract and of depriving it of its property without due process of law.

Wherefore, the said Atlantic Coast Line Railroad Company, plaintiff in error, prays that said judgment of the Supreme Court of the State of South Carolina be reversed, and that the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

(Signed) P. A. WILCOX,
(Signed) F. L. WILCOX,
(Signed) HENRY BUCK,
Attorneys for Plaintiff in Error.

Excerpts from Opinion of Supreme Court of South Carolina.

"Because his honor, Judge Gage, erred, it is respectfully submitted, in granting plaintiff's motion, and in refusing to hold section 2574 unconstitutional and void, in that said section, as applied to this action, is in contravention of article 5 of the Constitution of South Carolina and the Four-

teenth Amendment to the Constitution of the United States, in that said section deprives defendant of right of contract and deprives it of property without due process of law, making it responsible for the debts and liabilities of another without giving it adequate redress against such other."

"Because his honor, Judge Gage, erred, it is respectfully submitted, in refusing to hold that section 2574, construed with section 2575, is in contravention of said section of the Constitution of South Carolina and the Constitution of the United States, in that said section, while purporting to make the carrier really at fault responsible to defendant, yet they together deprive defendant of its property without due process of law, in that no provision is therein contained whereby defendant can obtain compensation for its loss of time in defending suit against it, or the expense of defending such suit, and its attorney's fees."

Section 2575 provides an action against the offending carrier. The only inadequacy complained of is for loss of time in defending an action and for attorney's fees. Except in cases where suits are brought on special contracts that provide for attorney's fees, these things are never allowed in this State. It would be dangerous doctrine, especially to appellant, for this court to say that adequate compensation included attorney's fees. This exception is overruled.

As to the position that only one inference can be drawn, this objection cannot be sustained. Lowry *vs.* Railroad Co., 92 S. C., 42; 75 S. E., 280: "It has been held, where a presumption of law arises, and there is some testimony to rebut this presumption, it is for the jury, and not for the court, to determine upon which side rests the weight." See, also, McLeod *vs.* Railroad, 93 S. C., 71; 76 S. E., 19, 705.

As to the constitutionality of section 2574 it is said, in Reynolds & Croft *vs.* Railway, 81 S. C., 387; 62 S. E., 446: "This statute has been held constitutional as to shipments entirely within the State." Venning *vs.* A. C. L. R. R. Co., 78 S. C., 42; 58 S. E., 983; 12 L. R. A. (N. S.), 117, 125; Am. St. Rep., 768. This shipment was entirely within this State.

Excerpt from the Charge of the Judge in the Court of Common Pleas of Dillon County on the Trial of the Case.

"I charge you as a matter of law that the terminal carrier, where damage occurs to freight, if there was damage, the presumption is that the damage occurred on the line of delivering carrier, like all presumptions in law it is a rebutable presumption."

Exception of Plaintiff in Error as Raised in the Original Court as to Depriving Him of His Property Without Due Process of Law as Taken from the Case Presented to the Supreme Court of South Carolina.

Because his honor, Judge Gage, erred, it is respectfully submitted, in refusing to hold that section 2574, construed with section 2575, is in contravention of said sections of the Constitution of South Carolina and the Constitution of the United States, in that said section, while purporting to make the carrier really at fault responsible to defendant, yet they together deprive defendant of its property without due process of law, in that no provision is therein contained whereby defendant can obtain compensation for its loss of time in defending suit against it or the expense of defending such suit and its attorney's fees.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 91

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

R. W. GLENN, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

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Of Counsel for Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

The sole question presented in this case for argument is concerning the constitutionality of sections 2574 and 2575 of the Civil Code of Laws of South Carolina, Vol. I, for 1912, in relation to the liability of connecting common carriers to consignees, owners, and shippers in the State of South Carolina. *No question of interstate shipments is involved in this action.* Said sections of the Code are as follows:

> 2574. Connecting Lines of Common Carriers Defined and Their Liability Fixed.—"All common car-

riers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers, shall in this State, with respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignee of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the courts of this State, any through bill of lading, way-bill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute *prima facie* evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them."

2575. Same.—"For any damages for injury, or damage to, or loss, or delay of any freight, baggage or other property sustained anywhere in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this State therefor, shall be held liable to such person or persons and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage or injury was sustained, together with costs of suit."

The plaintiff in error in its assignments of error takes the position, first, that the said two sections of the Code deprive it of its right to contract in derogation of the Constitution of the United States, and, second, that they together deprive it of its property without due process of law. *No other questions are raised in said assignments of error.*

Right to Contract.

We will first discuss the question of depriving the plaintiff in error of its right to contract. This has been before the court so often and has been decided so many times adverse to the plaintiff in error that we do not believe counsel are really in earnest in bringing such a question before this court; nevertheless, since they have set it out, we feel called upon to review some decisions of this court on the subject. For instance, it has been often held by this court "that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals or the public safety," as it is well expressed in the case of C., B. & Q. R. Co. *vs.* Ill., 200 U. S., 561, 592, and held in Crowley *vs.* Christenson, 137 U. S., 86.

It was held in Noble State Bank *vs.* Haskell, 219 U. S., 104, 111, that:

> "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

As to the power of the legislature of a State to pass an act which restricts the right to contract, when public policy demands it or when the same is for the best interest of the public, there is now no question in this court, for, as is well

said by this court in the case of Atlantic C. L. R. Co. *vs.* Riverside Mills, 219 U. S., 186, 202:

> "It is obvious from the many decisions of this court that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests."

Then, further, on this subject it has been held by this court and a number of other courts that the legislature or law-making powers are the judges of public policy, and when they have the constitutional power to legislate, public policy is what the statutes passed by them enact, and when the State has spoken through its legislature there is no more room for speculation as to what the policy of the State is.

Cyc., vol. 9, p. 482.

And it was held in the case of McLain *vs.* Arkansas, 211 U. S., 547, as follows:

> "The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

It has also been held that the mere fact of the passing of a consideration on a contract which has been declared void by a statute will in nowise sustain the contract, since to hold such a doctrine—that is, to hold that the passing of a

consideration will make a contract in derogation of a statute binding—would be equal to holding that individual action may defeat the public policy of which the statute is the expression, and the whole system of the law made for the protection of the public would be defeated thereby.

In view of these authorities it seems to us unnecessary to set forth any further argument as to the right of the legislature of South Carolina to pass an act *which deprives any one within its borders* of the right to make contracts which are contrary to public policy and the best interests of the people.

Due Process of Law.

As to the question that the said two sections of the Code deprive the plaintiff in error of its property without due process of law. First, let us cite the court to the fact that the plaintiff in error is seeking in its assignments of error to *raise one phase of this question in this court which it never raised in the original court of common pleas nor in the Supreme Court of South Carolina*, and that phase is set forth in the last lines of the first assignment of error, to wit (page 47 of record): "In that no means is provided by the sections of the Code whereby it can recover the *amount* it pays out for its *costs of bringing a suit* for the recovery from the party really at fault the amount it has to pay for the loss or damage and attorneys' fees." This was not raised in either of the courts in South Carolina, and the only question raised in said courts on this point was that it was not provided in said sections so that it could recover compensation for its loss of time in defending itself from suit against it or the expense of defending such suit and attorneys' fees. The court can verify this by reference to pages 38 and 47 in the record and compare the exceptions in South Carolina court with assignments of error. It will be very plainly seen thereby that the plaintiff in error is jumping from one defense to another in moving the same from South Carolina

to Washington; in fact, this has been the policy of the plaintiff in error throughout the whole history of the case from its inception at Dillon, S. C. It went twice to the Supreme Court of South Carolina, one of which appeals was abandoned on the threshold of the Supreme Court; *and the whole substance of the defense is and always has been to exhaust the patience of counsel for defendant in error and the resources of the defendant who is a man of no financial ability* and to possibly finally win the case by a *default* at some point on the part of the defendant in error.

Taking up the question, however, just as it is set forth in the said assignment of error in detail, to wit:

> "That the plaintiff in error is deprived of its property without due process of law by said sections of the Code in that no means is therein provided whereby it can recover from the carrier on whose line the loss or damage occurred the amount paid on account thereof, the costs of defending this suit, the costs of a suit to recover such amount and attorneys' fees"—

we take the position that there is absolutely nothing worth the consideration of this court therein set forth. *In the first place, the said sections of the Code do provide a remedy whereby the carrier who pays for the damage or loss to the shipper or consignee can recover the amount so paid from the carrier really at fault, and the costs of suit, which is plainly provided by the terms of the said sections, and it is also plainly and clearly provided that he may recover the costs of bringing an action against the carrier really at fault,* as the court can see by reference to section 2575 of the Code of South Carolina above quoted, and this part of the assignments of error is preposterous. And it was so held in opinion of South Carolina Supreme Court, page 41 of record.

Now, the only thing left is the costs of defending the suit against itself brought by the shipper or consignee or owner and its attorneys' fees when it *refuses* to pay for goods that are damaged which were shipped over *its road* as a part of

the route at least. In the *first place*, the plaintiff in error was not *forced by these statutes to defend itself* when the claim was made; it could have paid it and immediately demanded *payment from the road really at fault* if it was any other road that was at fault. Then it would never have had to pay out anything except that which it could recover under the statute without any expense attached, if it is possible to hold that the statutes do not provide ample means for it to recover every item of its expense. And certainly it could not be presumed by the court that they, the common carriers, would have to pay any unjust claim for which they could not recover against another carrier, and such could not be a part of this case. And they certainly have *no right to refuse to pay a just claim*, and therefore would not deserve to be reimbursed for paying out expense to defeat a just claim. Under this view of the matter we do not see how it can be consistenely argued before the court that there is anything in this phase of the assignments of error. As to the question of the recovery of attorneys' fees, it does not seem to us that this can properly be raised in this case, as that is in *futurity*. There is nothing in the records of *this case about attorneys' fees in some future case* that has never been brought. *This court could as easily take judicial notice of the fact that the road really at fault would pay up the whole damage on demand by the plaintiff in error as it could take judicial notice of the fact that attorneys' fees would or would not be necessary to enforce a settlement from the road really at fault.* But if the same can be properly considered in this case, then it seems to us properly disposed of in the *decision of the Supreme Court of South Carolina* on the case at bar, which may be found at page 41 of the record, wherein the court holds that attorneys' fees are not recoverable in South Carolina except in cases for malicious prosecutions or where bonds have been made for the payment of same; and that to hold the same to be a part of adequate compensation would certainly be a great disadvantage to railroads, and, further, no one is immune from being sued and having to

defend himself and pay for his attorneys' fees and expenses, except when he is maliciously sued; but the court in the case at bar cannot assume that a carrier will ever be sued under these sections of the Code unless the shipper, owner, or consignee has really sustained damage, and in such case some connecting road is at fault, and the one paying the damage or loss can recover from the one really at fault, and they have no reason to pay attorneys to defeat a just claim.

For the sake of argument let us assume, however, that the plaintiff in error is in *some infinitesimal* way deprived of its property without due process of law on account of the fact that it, together with a number of other railroads, by their long stretches of lines of railway, are situated so that when a man orders goods from one part of the State to be shipped to another, and cannot afford to go along with his property *and see exactly by whom, when, and where the same is damaged and injured;* and when he demands satisfaction from one road, and it says that some other road committed the injury, and the shipper signed a contract to hold the road that did the damage responsible, although the road *made the shipper sign it before it would take the property for shipment;* and when the shipper demands satisfaction from another road and it says the same thing; and under this state of affairs the legislature of South Carolina steps in and says the shipper may sue either one of them, we say, for the sake of argument, assume, as aforesaid, that the plaintiff in error did not injure the property in this particular shipment, and, although it may recover from the party really at fault the amount paid out to the owner, still it may lose some attorneys' fees or *some little expenses by its own fault in not paying a just claim promptly and by its attempt to defeat the rights of the shipper or owner,* still must the court assume that it could not with its facilities have immediately ascertained the damage when it occurred and paid it and in a very short while recovered under the statute from the party really at fault. *They are certainly not required by the stat-*

utes to wait until they are sued before paying in order to recover from the party really at fault. As it was stated in substance in the case of Atlantic C. L. R. Co. *vs.* Riverside Mills, 219 U. S., 202; 55 L. Ed., 181.

Must a shipper or owner be forced *to go hundreds of miles, employ detectives, go to a great outlay of expense* in order to discover the party really at fault in bringing about damages to a shipment before bringing a suit *and then possibly have to sue a half dozen roads before getting the right one and lose all he has trying to recover his loss,* when any one of these connecting roads, by their system of inter-settlements, traffic balance sheets, and inter-regulations which they are forced to keep straight with each other, to carry on their business of inter-shipments, *can readily and easily ascertain the party at fault and adjust it with each other without any difficulty,* all of which may be judicially known to the court. Then, to go further along this line, under the system of connecting railways, the opportunities such great systems may have for connivance and the withholding of information, should the same be exercised, how would it be possible for any one to ever recover against any road? *As a matter of fact, this state of affairs is just what gave occasion for the passage of the acts of the legislature of South Carolina in question in this case.* And the same state of affairs in interstate matters gave occasion for the passage by Congress of the Carmack amendment, which was passed upon by this court in the case of Atlantic C. L. R. Co. *vs.* Riverside Mills, *supra.* We cannot see any difference in the principle of these sections of the Code of South Carolina and the Carmack amendment, except that the one is a State statute and applicable to intrastate commerce and the other is a United States statute and applicable to interstate commerce. Of course the Carmack amendment makes the initial carrier liable in all cases, but there is no reason why it could not have made either carrier liable just as well as the South Carolina law makes them. Certainly if the initial carrier may

be made absolutely liable, where is there any legal reason why either one may not be made liable?

Presumption of Law.

Before statutes were ever passed on these subjects by one line of authorities the initial carrier could be sued and held responsible except when it contracted against such liability, and when a terminal carrier was sued it was held that the presumption of law was that the damage occurred on the terminal line. In the case at bar the court charged that the presumption of law was such and the Supreme Court of South Carolina so held (see *g*, page 42 of the record) that it was a question for the jury to decide between this presumption and the proof in rebuttal of such presumption whether the damage occurred on the terminal line or not, and such has been often held by this court in cases too numerous to mention. And for this reason alone, if for no other, it seems to us the case should be affirmed on the ground that, regardless of the statutes of South Carolina, the judgment in the case at bar can stand on the common law alone as the terminal carrier was sued; and the defendant was allowed to put in testimony that the damage did not occur on its line (Rec., pp. 21, 22, 23, 24) this issue as to where the damage occurred then went to the jury, and this court will always uphold a decision of a State court if there are any grounds whatever in the case upon which the same may be upheld.

Will the Supreme Court of the United States declare unconstitutional an act of the legislature of South Carolina when it only affects matters within the borders of that State and is a regulation to the best interests of the public and is made in the interests of public policy?

We respectfully invite the attention of the court to the following excerpts from the decision of this court and others and the following citations of authorities:

In the case of Atlantic C. L. R. Co. *vs.* Riverside Mills, 219 U. S., 186, 206, the court, quoting from Gundling *vs.* Chicago, 177 U. S., 183, 188, said:

> "Unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

It was held in Crowley *vs.* Christenson, 137 U. S., 86:

> "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community."

It seems to us, therefore, that the test whether due process of law has been violated is that of reasonableness as distinguished from arbitrary action, but this must not be understood to authorize the court to substitute its judgment for that of the legislature as to the necessity or propriety of legislation, or, as has been said by this court:

> "Judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."
> Bank *vs.* Haskell, 219 U. S., 104-110.

It was well said by the court in the case of Hurtado *vs.* California, 110 U. S., 516-558:

> "That a process of law which is not otherwise forbidden must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country, but it by no means follows that nothing else can be due process of law." "But to hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of

progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the law of the Medes and Persians." Where the public interest or safety and welfare of the State require the curtailment of the liberty of contract the latter may be restrained."

All these principles of the law are upheld and approved by the court in the following cases:

Patterson *vs.* Eudora, 190 U. S., 169, 179.
Twining *vs.* New Jersey, 211 U. S., 78, 127.
Iron Co. *vs.* Harbison, 183 U. S., 13, 22.
McLain *vs.* Arkansas, 211 U. S., 547.
Billings *vs.* Illinois, 188 U. S., 97, 104.
Mobile County *vs.* Kimball, 102 U. S., 691, 707.
Camfield *vs.* United States, 167 U. S., 518.

We therefore respectfully submit that the judgment of the Supreme Court of South Carolina should be affirmed.

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